Supreme Court, U.S.
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No. 02-473

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: Sept. 23, 2002
CERTIORARI GRANTED: Feb. 24, 2003

153 pp

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. 98-0269

UNITED STATES OF AMERICA

v.

LASHAWN LOWELL BANKS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
07/23/98	4	**TRANSCRIPT OF MAGISTRATE PAPERS** frm dist of NV in Mag Case #98-2183-M-RLH re: D/Banks: a) **COMPLAINT** o/d 7/15/98 (fld 7/16/98) b) **WARRANT** iss'd to USM re: D/Banks dtd 7/16/98 c) **MINUTES OF INITIAL APPEARANCE** re: D/Banks

DATE	DOCKET NUMBER	PROCEEDINGS
		(RLH) ORD 1) Govt mves for deten; Deten hrg set for MON, 7/20/98 @ 2:00pm; Dfs cnsl wll also be confrmd @ ths time (Tape #98-3-61) cps dist
		d) **ORDER OF TEMPORARY DE TENTION** re: D/Banks dtd 7/16/98 (RLH)ORD: D detnd pend deten hrg set for MON, 7/20/98@ 2:00pm in Ctrm #4, 2nd flr cps dist
		e) **WARRANT** w/USM retd, D/Banks arr 7/16/98
		f) **MOTION** obo D/Banks for Reconsdrtn of Deten Ord (f) (Dispo: Denied # sg
		g) **MINUTES OF FURTHER PROCEEDINGS** re:D/Banks Deten hld on 7/20/98 (fld 7/21/98) (RLH) ORD 1) Prelim Hrg set for WEDS, 7/29/98 @4:00pm 2) Govt mves for deten; Crt hrs argmnt; P/T deten ord (Tape #98-3-62) cps dist
		h) **ORDER OF DETENTION** re: D/Banks dtd 7/20/98 (RLH) ORD: D detnd pend trl cps dist

DATE	DOCKET NUMBER	PROCEEDINGS
		i) **MINUTE ORDER** re: D/Banks dtd 7/23/98 (RLH) ORD; GJ retd Indctmnt on 7/22/98 in CR-S-98-269-JBR (RLH); Prelim Hrg vctd; A/P set for FRI, 7/31/98 @ 8:30am in Ctrm #4, bfr LRL cps dist lsd
		* * * * *
12/23/99	48	**MOTION** obo D/Banks to Suppr (Evid Hrg Rqstd) (m) lsd (Dispo: Resp #50; mins #52; R&RH 53; JBJS #55; DENIED ORD #57)
		* * * * *
01/06/00	50	**RESPONSE** by Govt To D/Banks' Mtn To Suppr (#48) (m) lsd
		* * * * *
03/20/00	55	**OBJECTIONS** obo D/Banks To Mag's R/R (#53) re: Mtn To Suppr (#48) (m) lsd (Dispo: DENIED #58)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/18/00	59	**ORDER** re: D/Banks' Ojbs (#55) To Mag's R/R (#53) (JBR) ORD 1) Mag's R/R (#53) ADOPTED 2) D's Mtn To Suppr (#48) DENIED (EOD 4/19/00) cps dist lsd
		* * * * *
09/05/00	73	**JUDGMENT** re: D/Banks (JBR) ORD as to Glty Plea to Cts 1 & 2: 1) 135 mos cstdy USBOP (135 mos as to ea ct & bth cts to run concrrnt w/ea othr) 2) Remnded to cstdy USBOP 3) 5 yrs Sprvsd Rels (see doc for spec conds) 4) $200 Assessmnt 5) Fine waivd 6) Sent dprts frm gdlne range due to ovr-reprsntatn of CR hstry catgry (EOD 9/7/00) cps dist lsd (*5 yr Denial Of Fed Bnfts purs to 21/862)
		* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10439

UNITED STATES OF AMERICA

v.

LASHAWN LOWELL BANKS

DOCKET ENTRIES

DATE	PROCEEDINGS
10/12/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 9/18/00; setting schedule as follows: transcript shall be ordered by 10/9/00 for Lashawn Lowell Banks; transcript shall be filed by 11/8/00; appellant's briefs, excerpts due by 12/18/00 for Lashawn Lowell Banks; appellee's brief due 1/17/01 for USA; appellant's reply brief due by 1/31/01 for Lashawn Lowell Banks. (RTrequired: y) (Sentence imp 135 months) [00-10439] (dv)
10/13/00	Criminal Justice Act voucher sent () to Randall J. Roske for Appellant Lashawn Lowell Banks [00-10439] (tu)

DATE	PROCEEDINGS
2/1/01	Filed motion and order PROMO (Deputy Clerk: jlc) the opening brief in this appeal was due on 12/18/00. The ct is now in receipt of aplt's late mtn for an ext of time to file the opening brief. The mtn is GRANTED, however, in view of the delay in the prosecution of this appeal any further ext of time to file the opening brief is DISFAVORED. The briefing schedule is as follows: the opening brief and excerpts of record are due 2/22/01, the answering brief is due 3/26/01, and the optional reply brief is due 14 days from service of the answering brief . . . (FOR COMPLETE TEXT SEE ORDER) (Motion recvd 1/30/01) [00-10439] (rc)
2/23/01	Filed motion and order (Deputy Clerk: jlc) Appellant's second late motion for an extension of time to file the opening brief is DENIED. The opening brief and excerpts of record are now due March 9, 2001, the answering brief is due April, 9 2001, and the optional reply brief is due 14 days from service of the answering brief. (PROMO) (Motion recvd 02/20/01) [00-10439] (dv)
3/12/01	Filed original and 15 copies aplt's opening brief of 18 pages; and 5 excerpts of record in 2 volumes; served on 03/09/01. (Informal: No) [00-10439] (dv)

DATE	PROCEEDINGS
4/6/01	14 day oral extension by phone of time to file brief. [00-10439] appellants' brief due 4/23/01; appellees' brief due 5/23/01; the optional reply brief is due 14 days . . . (king)
4/30/01	Filed original and 15 copies appellee USA's answering brief of 19 pages brief and 5 supplemental excerpts of record; served on 4/23/01. [00-10439] (dv)
5/29/01	Filed original and 15 copies aplt's reply brief of 13 pages served on 5/24/01. (Informal: No) [00-10439] (dv)
6/5/01	Calendar check performed [00-10439] (mw)
7/9/01	Calendar materials being prepared. [00-10439] [00-10439] (mw)
7/11/01	CALENDARED: SAN FRAN Sept 10 2001 1:30 pm Courtroom 3 [00-10439] (aw)
8/16/01	CJA travel authorization sent (Authorization # 9CJA00-105390901) to Randall J. Roske for Appellant Lashawn Lowell Banks. [00-10439] (mv)
9/10/01	ARGUED AND SUBMITTED TO Henry A. Politz, William A. FLETCHER, Raymond C. FISHER [00-10439] (sa)

DATE	PROCEEDINGS
11/2/01	Filed certificate of record on appeal; RT filed in DC on 10/26/01. [00-10439] (dv)
3/5/02	FILED OPINION: AFFIRMED in part, REVERSED in part and REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Henry A. Politz, author; William A. FLETCHER; Raymond C. FISHER, Partial Concurrence and Partial Dissent) FILED AND ENTERED JUDGMENT. [00-10439] (dv)
3/18/02	Filed motion of Appellee and order (Deputy Clerk dv) Aple's motion for an extension of time for leave to file a petition for rehearing with suggestion for rehearing en banc is granted the petition for rehearing is now due 04/18/02. [4390850-1] (Motion recvd 03/11/02) [00-10439] (dv)
4/18/02	[4412254] Filed original and 50 copies aple USA's petition for rehearing with suggestion for rehearing en banc of 13 pages; served on 04/17/02. (PANEL AND ALL ACTIVE) [00-10439] (dv)
5/24/02	Filed order (Henry A. Politz, William A. FLETCHER, Raymond C. FISHER) Judges Politz and W. Fletcher have voted to deny the petition for rehearing, and Judge Fisher has voted to grant the

DATE	PROCEEDINGS
	petition for rehearing. Judges W. Fletcher and Fisher have voted to deny the petition for rehearing en banc and Judge Politz so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. The petition for rehearing and the petition for rehearing en banc filed 04/19/02 are DENIED. [4412254-1] [00-10439] (dv)
6/3/02	MANDATE ISSUED [00-10439] (dv)
8/2/02	Received plaintiff-aple USA's motion to recall the mandate; served on 07/31/02. (PANEL) [00-10439] [4496501] (dv)
8/6/02	Filed order (Raymond C. FISHER,) aple's motion to recall the mandate filed 08/02/02 is GRANTED. It is ordered the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court on or before 10/05/02. (PHONED OUT AT 12:30 p.m.) [4496501-1] [00-10439] (dv)
8/13/02	Received Appellee USA letter dated 08/12/02 re: Notice of case developments. 1). On 08/02/02 USDC ordered the release of def from custody. 2). have received word on 08/0702 Solicitor General authorized the filing of petition for writ of cert in the US Supreme Court. (PANEL) [00-10439] (dv)

DATE	PROCEEDINGS
8/19/02	Received letter from the Supreme Court dated 8/14/02 re: The application for an ext. of time within which to file a petition for a writ of certiorari in the above-entitled cs has been presented to Justice O'Connor, who on 8/14/02, extended the itme to and including 9/21/02. (CASEFILES) [00-10439] (af)
8/19/02	Received copy of District Court order filed on 08/02/02; defendant is released on a Personal Recognizance bond.; status conference set for 10/04/02 at 9:30 am (casefile) [00-10439] (dv)
9/30/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-473 filed on 09/23/02 and placed on the dkt on 09/23/02. [00-10439] (dv)
2/28/03	Received notice from Supreme Court, petition for certiorari GRANTED on 02/24/03. Supreme Court No. 02-473 (dv)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. CR-S-98-269
[JBR (KLH)]

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

Filed July 22, 1998

CRIMINAL INDICTMENT

Violation: 21 U.S.C. § 841(a)(1) – Possession of Controlled Substance With Intent to Distribute; 18 U.S.C. § 922(g)(3) – Drug User in Possession of Firearms

THE GRAND JURY CHARGES THAT:

COUNT ONE

(Possession of Controlled Substance with Intent to Distribute)

On or about July 15, 1998, in the State and Federal District of Nevada,

defendant herein, knowingly and intentionally possessed approximately eleven ounces of cocaine base, a Schedule II Controlled Substance, with intent to distribute; in violation of Title 21, United States Code 841(a)(1).

COUNT TWO

(Drug User in Possession of Firearm)

On or about July 15, 1998, in the State and Federal District of Nevada,

LASHAWN LOWELL BANKS

defendant herein, being an unlawful user of a controlled substance, to wit: cocaine and cocaine base, did knowingly possess in and affecting commerce firearms that is: a Desert Eagle .40 caliber semi-automatic pistol, serial number 9631432; a Lorcin .380 caliber semi-automatic pistol, serial number 374026; and, a Beretta .22 caliber semi-automatic pistol, serial number BER 587551, each of which firearms had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Section 922(g)(3).

DATED: This 22 day of July 1998.

A TRUE BILL:

/s/ NANCY P. WILLIAMS
FOREPERSON OF THE GRAND JURY

KATHRYN E. LANDRETH
United States Attorney
/s/ L.I. O'NEALE
L.I. O'NEALE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269 BR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

[Filed: Dec. 23, 1999]

MOTION TO SUPPRESS
(EVIDENTIARY HEARING REQUESTED)

COMES NOW the Defendant, LASHAWN LOWELL BANKS, by and through his appointed Counsel, Randal J. Roske, Esquire, and moves this Honorable Court for its order granting him an evidentiary hearing and an order suppressing the tangible and intangible fruits of the illegal search and seizure alternative grounds for suppression of statements is based upon the lack of voluntariness of Mr BANKS statements. This motion is supported by the attached memorandum of points and authorities papers and pleadings attached hereto.

Dated this 23 day of December, 1999.

/s/ RANDALL J. ROSKE
RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, NV 89106-4026
Counsel for Defendant
LASHAWN LOWELL BANKS

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE FACTS

On July 16, 1998, a warrant for the arrest for LASHAWN LOWELL BANKS (hereinafter LASHAWN) was issued by Magistrate Judge Hunt. This was based upon a criminal Complaint filed charging LASHAWN with possession of a controlled substance and ex-felon in possession of a firearm. The Complaint was based upon an affidavit which recounted facts from a search warrant issued at the request of North Las Vegas Police Department on July 8, 1998, by Stephen J. Dahl, Justice of the Peace North Las Vegas Township.

The affidavit in support of the search warrant (attached as Exhibit A) states the following facts:

1. That North Las Vegas Police Department Office Wilson Crespo spoke with an undisclosed person (denominated as a reliable confidential informant or "CI") who stated he could buy cocaine from "Shakes" at 1404 Henry Drive in North Las Vegas Nevada. "Shakes" was not further identified as being male /female, black/white or any other distinctive characteristic.

2. Officer Wilson Crespo vouched for the "CI" for participating in numerous times in controlled buys yielding "numerous pounds of cocaine, methamphetamine, marijuana, and money".

3. That Officer Wilson Crespo gave $200 from the "narcotic buy fund" to the "CI" after searching his person for "drug or monies".

4. The "CI" then went into Apartment D located at 1404 Henry Drive, knocked on the door and entered the apartment. After "a few minutes" the "CI"

came out to the undercover officer Crespo's vehicle. The "CI" then handed Officer Crespo two large off-white rocks of cocaine which the "CI" said he purchased from a person only identified as "Shakes". (Id.)

5. A "NIK" field test kit was used to validate the rock was presumptively positive for cocaine. The total weight of the "large rocks" was 7.55 grams. (Id.)

No other information specific to the investigation was set forth making any attempt to particularly describe the person identified only as "Shakes" although common sense would dictate this information would be of obvious relevance to an investigating officer.

On July 15, 1998, officers and agents of the North Las Vegas Federal Drug Task Force conducted a daytime search of 1404 Henry Drive, Apartment D in North Las Vegas, Nevada. The search occurred at 2:15 p.m. When the officers arrived, their report (please see Exhibit B North Las Vegas Police Report dated 7/15/98 at page five) reflects that they knocked on the door and announced "Police Search Warrant" and they waited for an unspecified period of time and then battered in the door. The Defendant was located in the hallway naked and dripping wet with soap on his body. (Id.)

According to the Narrative Summary, 11 ounces of cocaine base were found in Apartment D along with three handguns and $6,095. LASHAWN was at gun-point taken into custody by SWAT team officers armed with automatic weaponry. LASHAWN was ordered to the floor and one officer rushed over to him armed with a machine gun wearing all black and a hood and put his weight on his knee which was on LASHAWN's back. At

the same instant the officer put the barrel of his weapon on LASHAWN's head. LASHAWN, at that moment, believed his life hanged on the finger of the officer's machine gun. At that moment, LASHAWN was unsure whether he was in custody or whether he was a victim of a robbery (please see Affidavit of Counsel, Exhibit C). Slowly, LASHAWN, who was highly intoxicated, from smoking crack and marijuana, began to realize that the armed intruders were police. After what seemed an eternity, the officer who held the gun to LASHAWN's head took his weight off his knee (which was pinning LASHAWN to the floor). LASHAWN was escorted under this coercion and duress of automatic weaponry to the kitchen table where he was tossed some underwear and told to sit down and not move. LASHAWN complied with their every request, fearing that any hesitation or resistance would result in a beating or his death.

In the coercive setting of his intoxication and under the excitement of the breaking and entry and detention LASHAWN was given "Miranda Warnings." He was directed to sign waivers. He was also instructed to sign consents to search his vehicle.

As the agents proceeded to search, they loudly announced their discoveries, "translating" the amounts of controlled substances into years of incarceration. Weapons were also located during the search. Each weapon was presented to LASHAWN and he was interrogated as to the ownership of same. A bullet proof vest was also discovered and its ownership was confirmed. It is noteworthy that the "Narrative Summary" substantiates LASHAWN's intoxication on controlled substances when raid took place. In the "Narrative Summary," it states in the fourth paragraph. "Banks admits that the money, guns, and cocaine belonged to him and that he not only sold

cocaine, but he used some of it for his personal consumption."

After gaining various admissions from LASHAWN, the officers turned their attention on identifying who the suppliers of LASHAWN were. LASHAWN advised that he was reluctant to disclose his suppliers because "they were like family to him." LASHAWN made a request for counsel and at that juncture interrogation ceased.

LASHAWN was the transported to jail and booked into state custody. LASHAWN thereafter was taken into federal custody on a warrant for arrest issued by Magistrate Judge Hunt.

II. THE LAW

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon provable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the things to be seized.

In this case, Officer Crespo sought a search warrant to seize an "unknown quantity of cocaine", "paraphernalia", and "personal property which would tend to establish a possessing interest in the items seized." (Please see search warrant attached hereto as Exhibit D) In application and affidavit for search warrant, Officer Crespo recounts the following facts as "probable cause":

1. A "confidential informant" stated "they (sic) could buy rock cocaine at 1404 Henry Drive" from a subject known only as "Shakes."
2. That the informant has been used in an unspecified number of controlled buys yielding "pounds of cocaine, methamphetamine, marijuana and money."
3. That Officer Crespo searched the informant for contraband and found none.
4. That Officer Crespo drove the informant to 1404 Henry Drive. The informant was let out and he walked out to the apartment, was let in and remained inside for a "few minutes."
5. The informant left the apartment thereafter and approached Officer Crespo. The informant "handed two large off-white colored rock (sic) of cocaine" which the CI stated had been purchased rom the subject named "Shakes" with the aforementioned buy money.
6. A field of forensic test was done on the two "rocks" and a presumptive result was positive for cocaine. The weight of the rocks was 7.55 grams.

The balance of the Affidavit is devoted to various conclusions and opinions as to what kinds of evidence would be found. The application was made on July 8, 1998, but the search did not occur until July 15, 1998 at 14:15 hours or 2:15 p.m. (some seven days later). The North Las Vegas Police Officers were acting jointly with the agents of the Federal Bureau of Investigation. In fact the interrogation of LASHAWN was performed by agents of the FBI. Special Agent Tomasso (Please

see FBI 302 Report, Investigated on July 15, 1998 and dictated on July 15, 1998). In this case, the joint task force apparently knocked on the door, but did not announce their authority and purpose as required by Title 18 U.S.C. § 3109. The door was then battered in after an unspecified amount of time after the knock.

A. The Fourth Amendment and Title 18 U.S.C. § 3109 requires that announcement of "authority and purpose" before the forcible entry can be lawfully accomplished.

The Fourth Amendment guarantees members of the public security from unreasonable searches and seizures. The zone or area accorded the greatest sanctity from intrusions by law enforcement in one's own home or abode. This is explained by a variety of the United States Supreme Court cases as a reflection of our society's recognition that people have the greatest legitimate expectation of privacy in the greatest legitimate expectation of privacy in their own homes.[1]

Here, the reports indicate that LASHAWN never heard this and it is believed that if any announcement was made, it was with insufficient volume to effectuate actual notice to LASHAWN. No justification for failure to warn was set forth in the police reports or FBI discovery. The rationale for announcement is that it is preferable to allow voluntary compliance when ever feasible. In *Ker* v. *California*, 374 U.S. 23 (1963) the announcement rule was recognized as a constitutional requirement which if not adhered to can invalidate an otherwise lawful search. What is beyond civil is that the entry by law enforcement was a "breaking" as a result of force [See, *Sabbath* v. *United States*, 391 U.S.

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[1] *Caldwell* v. *Lewis*, 417 U.S. 583, 590 (1974). *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

585 (1968)] Here, entry was effectuated by a ram device.

Because the requirements of the "announcement" of Title 18 U.S.C. § 3109 were not met, fruits of the search, drugs, firearms and confession, must be suppressed as "fruits of the poisonous tree." [Please see *Wong Sun v. United States*, 371 U.S. 471 (1963).

B. The confession must be suppressed as a violation of the Fourth and Fifth Amendments.

LASHAWN was interrogated after the entry into the apartment. As items were seized, agents/police officers translated the amounts seized into prison time. When the agents/police officers entered the apartment, LASHAWN was under the impression that he was the victim of an armed robbery. The excitement and terror permeated his detention and interrogation. LASHAWN was also highly intoxicated. Despite Miranda warnings being given, LASHAWN did not make a voluntary confession.

Voluntariness of a confession requires an examination of the totality of circumstances including the history of the accused education physical condition in addition to the circumstances surrounding the actual statement. *Crane v. Kentucky*, 476 U.S. 683 (1986); *Mince v. Arizona*, 437 U.S. 385 (1978).

After a hearing, evidence justifying suppression of the post detention statements will be clear. A hearing developing the facts must be held to address these issues.

III. CONCLUSION

Wherefore in light of the foregoing, it is respectfully urged that an evidentiary hearing be held and the tangible and intangible evidence be suppressed.

Respectfully submitted,

/s/ RANDALL J. ROSKE

RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, NV 89106-4026
Counsel of Defendant
LASHAWN LOWELL BANKS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers.

That on December 23, 1999, she served the Motion to Suppress by placing said copy in a post-paid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope(s) and contents in the United States mail at Las Vegas, Nevada, by hand delivery.

Address(es): United States Attorney
701 E. Bridger, Suite 800
Las Vegas, NV 89101

/s/ STACEY L. STIRLING
STACEY L. STIRLING

APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT

[Filed: July 14, 1998]

STATE OF NEVADA)
) ss:
County of Clark)

OFFICER W. CRESPO being first duly sworn, deposes and states on information and belief that Affiant is an officer with the North Las Vegas Police Department presently assigned to the Narcotics Unit, has been with the North Las Vegas Police Department for over eight (8) years and has been assigned to the Narcotics Unit for over one (1) year.

There is probable cause to believe that certain property hereinafter described will be found at the following described premises, to - wit:

1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment, tan in color with brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north.

The property referred to and sought to be seized consists of the following:

1. An unknown quantity of cocaine.
2. The paraphernalia commonly associated with the ingestion and distribution of the controlled substance cocaine such as scales, packaging materials and "cut," grinders customer and

source lists, recordations of purchases and sales including "owe sheets" reflecting transactions in the controlled substance cocaine.

3. Limited items of personal property which would tend to establish a possessory interest in the items seized pursuant to this search warrant, such as personal identification, photographs, utility company receipts or addressed envelopes.

and as I am satisfied that there is probable cause to believe that said property is located as set forth above and that based upon the Affidavit attached hereto there are sufficient grounds for the issuance of the Search Warrant.

The property described constitutes evidence which tends to demonstrate that the criminal offenses of the Uniform Controlled Substances Act, NRS Chapter 453, have been and continue to be committed.

In support of your Affiant's assertion to constitute the existence of probable cause, the following facts are offered based on your Affiant's personal knowledge and on information and belief.

On 070798 Affiant contacted a reliable confidential informant (CI) who stated that they could buy rock cocaine from an apartment located at 1404 Henry Drive from a subject known only as "Shakes".

This same CI has been used numerous times in the past in controlled narcotics buys. These buys have lead to the seizure of numerous pounds of cocaine, methamphetamine, marijuana, and money. Affiant obtained $200.00 from the North Las Vegas Police Department (NLVPD) narcotics buy fund.

The CI was searched for any contraband or monies and none were found.

Affiant drove to the area of 1404 Henry Drive accompanied buy the CI while NLVPD Narcotics officers established surveillance in that area.

Affiant gave the CI the aforementioned $200.00. The CI then exited the vehicle and walked to 1404 Henry Drive while under constant surveillance. The CI walked to apartment "D". Upon knocking, the door opened and the CI was let in. After a few minutes the CI exited the apartment and walked directly back to Affiant's vehicle. The CI handed Affiant two large off - white colored rock of cocaine which the CI stated had been purchased from the subject named "Shakes" with the aforementioned buy money. The CI was searched again and no monies or contraband were found.

Affiant took custody of the cocaine and transported it to the NLVPD where it tested positive as cocaine with a total weight of 7.55 grams. The cocaine was booked into evidence along with a copy of the NIK test checklist.

A copy of the NIK test is attached.

Based on the Affiant's training and experience and on the information received from the reliable CI, it appears that the person or persons in control of the suspect premises are engaged in selling rock cocaine.

Also, persons involved in selling narcotics will frequently have at least some quantity of drugs on their persons and will utilize confederate agents and runners to assist them, and for this reason, Affiant prays that this warrant authorize a search of the persons found at the suspect premises during the execution of this warrant and the motor vehicles in which they have possessory interest.

Furthermore, Affiant knows from his training and experience, that persons who sell narcotics frequently will have ledgers and customer lists pertaining to their

illegal business. Also, narcotics dealers will need to have packaging materials, scales, cutting agents and like items to prepare and package controlled substances for sale.

Affiant wishes to continue to use the CI in controlled buy situations, and therefore, asks that the Application and Affidavit be ordered Sealed pending further Order of this Court in order to protect the identity of the CI and to use CI in further buys without potentially and possibly identifying CI.

Affiant prays that a nighttime search warrant be authorized due to the fact that several children have been playing in the area of 1404 Henry Drive. A nighttime clause would give Affiant the option of serving the search warrant when it would not endanger these innocent persons.

WHEREFORE, Affiant requests that a Search Warrant issue directing a search for and seizure of the aforementioned items at the location set forth herein and authorizing a nighttime search.

/s/ W. CRESPO
W. CRESPO

/s/ STEPHEN J. DAHL
STEPHEN J. DAHL
Justice of the Peace
North Las Vegas Township

SUBSCRIBED and SWORN to before me
this 8th day of July, 1998

[Filed: July 14, 1998]

IN RE: SEARCH WARRANT FOR

1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment, tan in color with a brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north.

ORDER SEALING AFFIDAVIT

Upon the ex parte application of W. Crespo, a commissioned officer with the North Las Vegas Police Department and Affiant, to seal the affidavit in support of the attached search warrant, and for good cause appearing therefore,

IT IS HEREBY ORDERED that the Affidavit in support of the attached search warrant be ordered sealed pending further order of this Court except that copies may be provided to the office of the Clark County District Attorney and the District Attorney may provide copies to a Defendant in a criminal proceeding as part of the criminal discovery process, and

IT IS FURTHER ORDERED a copy of this order sealing the affidavit be left at the premises along with the search warrant in lieu of the affidavit in support of the warrant.

DATED this 8th day of July, 1998.

/s/ STEPHEN J. DAHL
STEPHAN J. DAHL
Justice of the Peace
North Las Vegas township

/s/ W. CRESPO
W. CRESPO

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 1
TIME: 15:42 ----------INVESTIGATIVE PORTION---------- OF: 6

----------INCIDENT ORIGINAL----------

classification/additional information: | gang related?
TCS (COCAINE) HIGH LEVEL (OVER 28 GRAMS) | NO

invest bureaus/units notified:

location of occurrence: | rpt. dist: OJ neighborhood: XXX
1404 HENRY #D | OTHER JURIS OTHER JURISDICTION

from:	date / time	to:	date / time	report:	date / time
	7/15/98 / 14:15		7/15/98 / 14:15		7/15/98 / 14:15

hate crime? NO | fingerprints? NO |

routing?	prosecute?	prop report?	vehl report?	arrest rpt?	attach?
OTHER	YES	NO	NO	ADULT ONLY	

----------METHOD OF OPERATION----------

residential---type: target: security:

non-residtl---type: target: security:

entry----location: method:
exit----location: method:

suspect actions:
A. B. C.
D. E. F.
G. H. I.

----------DISPOSITIONS----------

[ ]-UNFOUNDED/NO CRIME--0 [ ]-SUBMITTED D.A.------5 [ ]-RECLASSIFY---------10
[ ]-JUVENILE------------1 [ ]-ADMIN. CLEARED------6 [ ]-VIC REFUSED PROS.--11
[ ]-NON DETECTIVE CLR---2 [ ]-EXCEPTIONALLY CLR---7 [ ]-AFFIDAVIT----------12
[ ]-DETECTIVE ARREST----3 [ ]-SCREEN CLEARED------8 [ ]-CA/DA DENIAL-------13
[ ]-SUBMITTED CITY ATTY-4 [ ]-NO CHGS FILED(NCF)--9 [ ]-OTHER-------------14

----------RECORDS----------

class code---ucr	sid number	enter scope	date ser no	cleared scope	date ser no

records bureau processed	ser no	detective bureau processed	ser no

supervisor approving	ser no	officer reporting	ser no
		CRESPO/WILSON	0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 2
TIME: 15:42 ----------PERSONS PORTION---------- OF: 6

name of person (001):	type: W	occupation:	susp id?
JACKS/DAVE	WITNESS	SGT.	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp
					000	000				

alias-aka: P#0753 | birthplace:
alias-aka: | ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 | 633-1793

descriptors:
descriptors:

name of person (002):	type: W	occupation:	susp id?
MELGAREJO/EDWING	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0837 | birthplace:
alias-aka: | ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 | 633-1793

descriptors:
descriptors:

name of person (003):	type: W	occupation:	susp id?
WALLING/BRAD	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0792 | birthplace:
alias-aka: | ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 | 633-1793

descriptors:
descriptors:

records bureau processed	ser no	detective bureau processed	ser no

supervisor approving	ser no	officer reporting	ser no
		CRESPO/WILSON	0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 3
TIME: 15:42 ----------PERSONS PORTION---------- OF: 6

name of person (004):	type: W	occupation:	susp id?
CORRADO/CHRIS	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0838 birthplace:
alias-aka: ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 633-1793

descriptors:
descriptors:

name of person (005):	type: W	occupation:	susp id?
PEARSON/DON	WITNESS	INVESTIGATOR	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#0997 birthplace:
alias-aka: ssn: mf no:

addr:
business: NLVPD 1301 LMBE NLV, N.V. 89030 633-1793

descriptors:
descriptors:

name of person (006):	type: W	occupation:	susp id?
TOMASSO/RICHARD	WITNESS	SPECIAL AGENT	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#5891 birthplace:
alias-aka: ssn: mf no:

addr:
business: FBI 700 E. CHARLESTON LV, N.V. 89104 385-1281

descriptors:
descriptors:

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		CRESPO/WILSON	0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 4
TIME: 15:42 ----------PERSONS PORTION---------- OF: 6

name of person (007):	type: W	occupation:	susp id?
LEON/DAN	WITNESS	SPECIAL AGENT	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#7690 birthplace:
alias-aka: ssn: mf no:

addr:
business: FBI 700 E. CHARLESTON LV, N.V. 89104 385-1281

descriptors:
descriptors:

name of person (008):	type: W	occupation:	susp id?
MOE/MITCH	WITNESS	SPECIAL AGENT	YES

sex	race:	hisp:	dob	age	hgt	wgt	hair	eyes	bld	cmp

alias-aka: P#14090 birthplace:
alias-aka: ssn: mf no:

addr:
business: FBI 700 E. CHARLESTON LV, N.V. 89104 385-1281

descriptors:
descriptors:

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		CRESPO/WILSON	0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 5
TIME: 15:42 ----------NARRATIVE PORTION---------- OF: 6

ON 07/15/98 AT ABOUT 1415 HOURS THE NLVPD NARCOTICS UNIT AND FBI SERVED A EARCH WARRANT AT 1404 HENRY APARTMENT #D.

WE KNOCKED AND ANNOUNCED "POLICE SEARCH WARRANT", AFTER WAITING A EASONABLE TIME FORCED ENTRY WAS MADE. THE OCCUPANT, LAWSHAWN LOWELL BANKS, WAS AKEN INTO CUSTODY WITHOUT INCIDENT IN THE HALLWAY NEAR THE BATHROOM. HE PPEARED TO BE COMING FROM THE BATHROOM SHOWER BECAUSE HE WAS SOAKING WET, AKED AND HAD SOAP ON HIS BODY.

INVESTIGATOR PEARSON WAS ASSIGNED PROPERTY CUSTODIAN. FOR, WHAT, WHERE AND Y WHOM EACH PROPERTY WAS RECOVERED SEE HIS FOLLOW-UP REPORT FOR ADDITIONAL NFORMATION.

SPECIAL AGENT TOMASSO AND I INTERVIEWED BANKS WHILE SEATED AT THE KITCHEN ABLE. AFTER BEING ADVISED OF HIS RIGHTS, BANKS ADMITTED THAT ALL THE DRUGS, VER 290 GRAMS OF COCAINE, LOCATED IN THE APARTMENT WHERE USED AND SOLD BY HIM.

FOR DETAILS OF BANKS' INTERVIEW SEE SPECIAL AGENT TOMASSO'S FD 302.

BANKS WAS TRASPORTED TO THE NLVDC WHERE HE WAS BOOKED BY SGT. JACKS FOR RAFFICKING A CONTROLLED SUBSTANCE (COCAINE) HIGH LEVEL (OVER 28 GRAMS).

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting CRESPO/WILSON	ser no 0750

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: ORIGINAL
DATE: 7/16/98 ----------POLICE REPORT---------- PAGE: 6
TIME: 15:42 ----------BOOKING PORTION---------- OF: 6

ame of arrestee: BANKS/LASHAWN LOWELL mf: 99069169 cs: 1258302

ex	race/ethnic	dt birth	age	hgt	wgt	hair	eyes	bld	cmp
?	B N BLACK	11/13/76	21	507	150	BLK	BRO	MED	DBR

lias-aka: COTTON/LASHAWN LOWELL | place of birth: -
lias-aka: | SAN DIEGO CA
lias-aka: | ssn: 559451618
lias-aka: | driv lic/st: 371890323776 NV

cars, marks,
tattoos, etc:
llness/injuries:

ddress (house no; apt no; street, city, state, zip) | phone number
404 HENRY DR APT D LAS VEGAS NV 98110 | 7024524457

next of kin name: CUBIE/BETTY relation: GRANDMOTHER
ext of kin address: 4770 E OWENS APT A107 phone: SAME
employer: UNEMPLOYED occupation: MAINTENANCE

ate/time of booking: 7/15/98 1741 | abno: 164286 |
lace of arrest: 1404 HENRY #D LV NV 89110 | arresting officer: | vehl
ate/time of arrest: 7/15/98 1415 | JACKS/EDWARD | YES
fficers present during booking: | transporting officer: | impd
ILLIAMS 1248/DAVID 1207 | JACKS/EDWARD | NO
ed ID:

o.	orig	charge	warrant/nrs	cts	fgm	bail	case num
1	PC	00782	453.3385	1	F	-NONE-	98011333
	PCN 70348757-01	TRAFFICKING C S COCAINE-28 GMS + (HIGH LEVEL)					

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting CRESPO/WILSON	ser no 0750

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 7-16-98

Lashawn Lowell Banks, 1404 Henry Drive, Apartment D, Las Vegas, Nevada, was interviewed by Special Agent (SA) Richard F. Tomasso of the Federal Bureau of Investigation and Officer Wilson Crespo of the North Las Vegas Police Department Narcotics Unit.

Banks was advised of the identities of the interviewing agent and officer and that he (Banks) had been placed under arrest for possession of a controlled substance. Banks was orally advised of his rights by SA Tomasso and then shown an Advise of Rights form, which he read and signed after saying he understood his rights. Banks advised he intended to cooperate and would answer only the questions he wanted to answer.

He claimed to have lived in the apartment alone for approximately five months, paying approximately $445 per month rent. The power bills were in his name but the telephone bill was in the name of Vickie Hawthorne, who had no connection to his drug activity or the apartment.

Investigation on 7-15-98 at Las Vegas, Nevada
File # 245D-LV-25886 Date dictated 7-15-98
Officer Wilson Crespo, NLVPD and
by SA Richard F. Tomasso RFT:jgh

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaded to your agency

Banks was shown approximately four ounces of rock cocaine found in a shoe box on the kitchen counter. He admitted it was his "crack" and stated there was an additional three or four ounces of cocaine located in his bedroom closet. Banks claimed that he did not "cook up" the cocaine from powder into "rock" form, but usually had someone else cook it. He stated that he not only used the cocaine, but sells it as well.

Banks was asked to provide to combination to a safe located in the back bedroom. He replied with the numbers "75-35-69."

SA Tomasso inquired about Banks' criminal background and Banks replied that as a juvenile he was sentenced to a term in Elko, Nevada on a weapons charge and was released approximately three years ago. Banks claimed that he was a member of the Rolling 60's Gang in Las Vegas, Nevada, but kept to himself and did not run with the gang.

Banks explained that the Chevrolet Caprice parked out front was his vehicle and he did not own any other vehicle.

Banks was asked to furnish information regarding his supplier. At that point, Banks stated his supplier was like family and he did not wish to provided his/her identity or other information such as the pager number he used to reach him/her. Banks stated even if he did cooperate ordering cocaine from his suppliers, it would take approximately two weeks to obtain because they move at their own pace and on their own schedule. He advised that he could order six to seven ounces of "rock" cocaine at any one time but more than that would be an unusual order.

Banks was shown equipment, apparently used to cook powder cocaine into "rock" cocaine, which was found in the kitchen cupboard. Banks claimed that he just purchased the equipment but had never used it because he does not cook the cocaine and that it is done for him.

Banks further advised that after getting out of prison approximately three years ago, he worked at the Horseshoe Casino for a short time and odd jobs, such as lawn work, with friends. He admitted to selling drugs during this time and that the six thousand dollars found in his apartment was money he saved over the years from working at the Horseshoe and the odd jobs. He then admitted that approximately two thousand dollars of the money was from selling drugs.

Banks then advised that he would consider providing the identity of his suppliers if a deal could be made for him. SA Tomasso advised Banks that no promises could be made for his cooperation other than the fact that it would be made known to the prosecuting attorney and, eventually the courts, that he cooperated.

Banks was also advised that he would still have to go to jail and face charges for which he was being arrested. Banks advised that he would think about divulging the identity of his suppliers after consulting with his attorney as to whether or not it was worth his cooperation.

Banks was then asked about the three weapons located in his apartment. When asked about the .22 caliber Beretta found on the closet shelf, Banks claimed that the gun was inoperative. As to the .40 caliber Eagle found on the couch and the bullet proof vest, Banks claimed he purchased them both at a gun show about a year ago and that the gun was registered. He also advised that the .380 caliber Lorcin was bought

from some guy on the street for $50 about a year ago but was not registered. Banks also indicated that the people he purchased his drugs from were Spanish speaking African Americans and Hispanics. Banks did not know if they were Mexican, Cuban or neither.

Banks was asked to describe how he would work his drug deals with his suppliers and he stated that it was just a matter of collecting the money for the drugs he had in his house and bringing them approximately three thousand dollars for another seven ounces. He claimed that he would just page them, they would call and tell him where to meet, and make a quick exchange. That was all he knew about them. He added that he usually sold the "crack" on various street corners in greater Las Vegas.

Prior to concluding the interview, Banks was asked if any drugs were stored at other locations (such as his mother's residence). He replied in the negative. He also claimed that his mother is not aware of his drug activity.

Before Banks was transported to the North Las Vegas Detention Center, he signed a Permission to Search Vehicle form, which was presented to him by SA Mitchell S. Moe and witnessed by SA Richard F. Tomasso.

Banks was permitted to contact his girlfriend, Kimberly Hawthorne, to come and secure is apartment. He was given a copy of the search warrant and receipt for all items seized from his apartment. Banks was transported to the North Las Vegas Detention Center where he was booked on state charges for possession of a controlled substance. A Federal detainer was placed on him by SA Richard F. Tomasso for him to be picked

up the following day for processing at the United States Marshal's Office and for an appearance before the United States Magistrate on Federal drug charges.

Attached to this FD-302 is a criminal history printout for Lashawn Lowell Banks.


```
CASE: 98011333        ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF:    69671
DATE:  7/19/98        ----------POLICE REPORT----------        PAGE:  1
TIME: 20:21           ----------INVESTIGATIVE PORTION----------  OF:  6
**********************************************************************************
----------------------------------INCIDENT FOLLOWUP-----------------------------------
 classification/additional information:                          ! gang related?
 SERVICE OF SEARCH WARRANT/PROPERTY REPORT                       !      NO
---------------------------------------------------------------------------------
 invest bureaus/units notified:
---------------------------------------------------------------------------------
 location of occurrence:          ! rpt. dist: OJ  neighborhood: XXX
 1404 HENRY #D                    ! OTHER JURIS    OTHER JURISDICTION
---------------------------------------------------------------------------------
 from:     date / time  ! to:     date / time  ! report:     date / time
       7/15/98 / 14:15  !     7/15/98 / 14:15  !          7/15/98 / 14:15
---------------------------------------------------------------------------------
 hate crime? NO    ! fingerprints? NO    !
---------------------------------------------------------------------------------
    routing? ! prosecute? ! prop report? ! vehl report? ! arrest rpt? ! attach?
     OTHER   !     YES    !     YES     !      NO       ! ADULT ONLY  !   YES
**********************************************************************************
-----------------------------------METHOD OF OPERATION-----------------------------------
 residential---type:                target:                security:

---------------------------------------------------------------------------------
 non-residtl---type:                target:                security:

---------------------------------------------------------------------------------
 entry----location:                          method:
  exit----location:                          method:
---------------------------------------------------------------------------------
  suspect actions:
  A.                    B.                    C.
  D.                    E.                    F.
  G.                    H.                    I.
**********************************************************************************
-----------------------------------DISPOSITIONS-----------------------------------
[ ]-UNFOUNDED/NO CRIME--0 [ ]-SUBMITTED D.A.------5 [ ]-RECLASSIFY---------10
[ ]-JUVENILE------------1 [ ]-ADMIN. CLEARED------6 [ ]-VIC REFUSED PROS.--11
[ ]-NON DETECTIVE CLR---2 [ ]-EXCEPTIONALLY CLR---7 [ ]-AFFIDAVIT----------12
[ ]-DETECTIVE ARREST----3 [ ]-SCREEN CLEARED------8 [ ]-CA/DA DENIAL-------13
[ ]-SUBMITTED CITY ATTY-4 [ ]-NO CHGS FILED(NCF)--9 [ ]-OTHER--------------14
**********************************************************************************
-----------------------------------RECORDS-----------------------------------
 class code---ucr !  sid number  !        date  ser no !          date  ser no
                  !              ! entered             ! cleared
                  !              ! scope               !   scope
                  !              !                     !
---------------------------------------------------------------------------------
**********************************************************************************
---------------------------------------------------------------------------------
 records bureau processed      ser no ! detective bureau processed     ser no
                                      !
---------------------------------------------------------------------------------
 supervisor approving          ser no ! officer reporting              ser no
                                      ! PEARSON/DONALD                  0997
---------------------------------------------------------------------------------
```

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 2
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type--descriptive information on property------- / additional descriptive information----------	stolen value	recover value
001	FIREAR	E brd: DESERT EAGLE mod: --- ------ ---- size: ser: 96314132 cal: 40 coll: BLK col2: own$: SEMI-AUTOMATIC HANDGUN FOUND ON LIVINGROOM COUCH BY 608	-------	-------
002	CURREN	E brd: US mod: --- ------ ---- size: ser: cal: coll: GRN col2: own$: $95 IN MISC BILLS FOUND ON LIVINGROOM COUCH BY 608	-------	-------
003	FIREAR	E brd: LORCIN mod: --- ------ ---- size: ser: 374026 cal: 380 coll: BLK col2: own$: SEMI-AUTOMATIC HANDGUN FOUND IN MIDDLE NIGHTSTAND DRAWER IN S.W. BEDROOM BY 601	-------	-------
004	CONSUM	E brd: mod: --- ------ ---- size: ser: cal: coll: col2: own$: APPROX 4.4 OZ OF ROCK COCAINE FOUND ON S.W. BEDROOM CLOSET SHELF BY 601	-------	-------
005	FIREAR	E brd: BARETTA mod: --- ------ ---- size: ser: BER587551 cal: 22 coll: BLK col2: own$: SEMI-AUTOMATIC HANDGUN FOUND ON S.W. BEDROOM CLOSET SHELF BY 601	-------	-------
006	CURREN	E brd: US mod: --- ------ ---- size: ser: cal: coll: GRN col2: own$: $6000 CASH FOUND ON S.W. BEDROOM CLOSET SHELF BY 601	-------	-------

++ totals-------)

type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting PEARSON/DONALD	ser no 0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 3
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type--descriptive information on property------- / additional descriptive information----------	stolen value	recover value
007	FIREAR	E brd: mod: --- ------ ---- size: ser: cal: coll: GRN col2: GLD own$: MISC GUN AMUNITION & MAGAZINES FOUND IN S.W. BEDROOM NIGHTSTAND BY 601	-------	-------
008	MISC	E brd: INTERNATIONA mod: TYPE II-A --- ------ ---- size: ser: 87510 cal: coll: BLU col2: own$: BULLET-PROOF VEST FOUND S.W. BEDROOM BY 601	-------	-------
009	MISC	E brd: mod: --- ------ ---- size: ser: cal: coll: col2: own$: MISC PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D LAS VEGAS, NEVADA 89110	-------	-------
010	MISC	E brd: mod: --- ------ ---- size: ser: cal: coll: BLU col2: own$: LVMPD GUN REGISTRATION CARD FOR PROPERTY ITEM #1 TO LASHAWN BANKS FOUND ON NIGHTSTAND IN S.W. BEDROOM BY 609	-------	-------
011	ELECTR	E brd: MOTOROLA mod: STARTAC 6000E --- ------ ---- size: ser: 572GXF0211 cal: coll: GRY col2: own$: CELL PHONE FOUND IN S.W. BEDROOM BY 601	-------	-------
012	CONSUM	E brd: mod: --- ------ ---- size: ser: cal: coll: col2: own$: APPROX 6 OZ OF ROCK COCAINE INSIDE SHOEBOX FOUND ON KITCHEN COUNTER BY 608	-------	-------

++ totals-------)

type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting PEARSON/DONALD	ser no 0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 4
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type	--descriptive information on property-------	stolen value	recover value
			additional descriptive information----------		
013	ELECTR	E	brd: UNICOMM mod:		
			size: ser:	-------	-------
			cal: coli: BLU col2: own#:		
			PAGER FOUND ON KITCHEN COUNTER BY 607		
014	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			BEAKER & SCALE INSIDE BLUE BAG FOUND IN KITCHEN CABINET BY 603		
015	CONSUM	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			APPROX 8 GRAMS OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603		
016	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			BABY FOOD JAR 1/4 FULL OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603		
017	MISC	E	brd: mod:		
			size: ser:	- -----	-------
			cal: coli: col2: own#:		
			SCALE FOUND ON KITCHEN COUNTER BY 603		
018	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: WHI col2: own#:		
			PLATE WITH RAZOR BLADE & RESIDUE ON IT FOUND ON TOP OF MICROWAVE IN KITCHEN BY603		

++ totals-------)

type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		PEARSON/DONALD	0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 5
TIME: 20:21 ----------PROPERTY PORTION---------- OF: 6

no.	artcds	type	--descriptive information on property-------	stolen value	recover value
			additional descriptive information----------		
019	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			MISC PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D LAS VEGAS, NEVADA 89110		
020	MISC	E	brd: mod:		
			size: ser:	-------	-------
			cal: coli: col2: own#:		
			FOUR MISC PHOTOS FOUND ON KITCHEN CABINET BY 608		

++ totals-------)

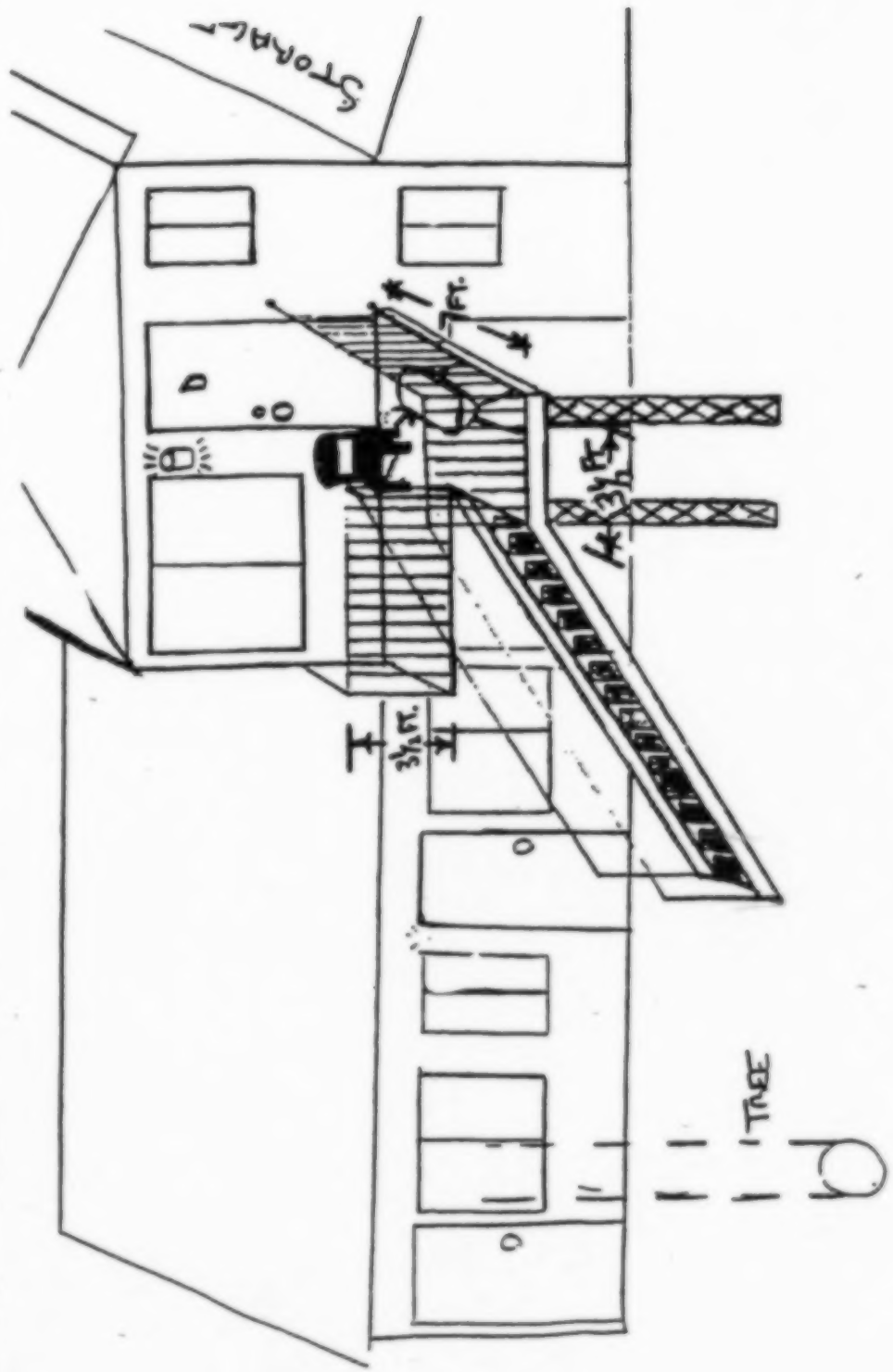
type: E-evidence; F-found; I-impounded; L-lost;
O-other; R-recovered; S-stolen; X-safekeeping

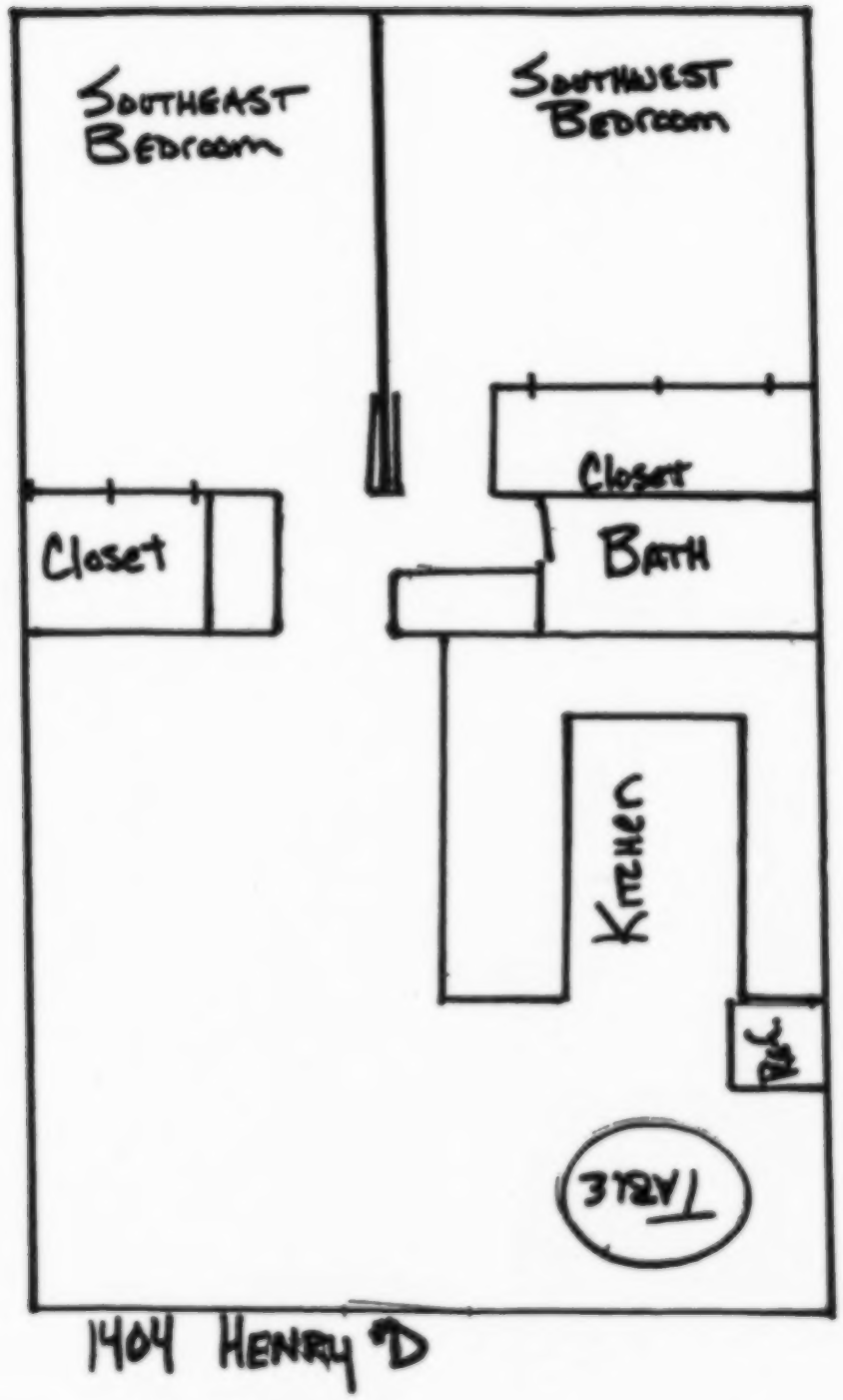
records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting	ser no
		PEARSON/DONALD	0997

CASE: 98011333 ----NORTH LAS VEGAS POLICE DEPARTMENT---- REF: 69671
DATE: 7/19/98 ----------POLICE REPORT---------- PAGE: 6
TIME: 20:21 ----------NARRATIVE PORTION---------- OF: 6

ON 7/15/98, AT 1415 HRS, THE NORTH LAS VEGAS POLICE DEPARTMENT (NLVPD) NARCOTICS UNIT SERVED A SEARCH WARRANT AT 1404 HENRY #D. I WAS ASSIGNED AS THE PROPERTY CUSTODIAN FOR THIS CASE. ITEMS WERE TAKEN FROM THE RESIDENCE FOR EVIDENCE. SEE PROPERTY LIST FOR DETAILS. AFTER TAKING INITIAL CUSTODY OF ALL EVIDENCE, I THEN TURNED IT ALL OVER TO SPECIAL AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION.

records bureau processed	ser no	detective bureau processed	ser no
supervisor approving	ser no	officer reporting PEARSON/DONALD	ser no 0997





North Las Vegas Police Department Inventory/Property Sheet		Case #: 98-11333
Location: 1404 HENRY #D		Date/Time: 071598/1415
01	BLACK DESERT EAGLE .40 CALIBER SEMI-AUTOMATIC PISTOL SERIAL #96314132	
	W/MAGAZINE W/ 8 ROUNDS FOUND ON LIVING ROOM COUCH BY 608	
02	$95 IN US CURRENCY FOUND ON LIVINGROOM COUCH BY 608 (8-$10/3-$5)	
03	BLACK LORCIN .380 PISTOL SEMI-AUTOMATIC PISTOL SERIAL #374026 W/ 7 ROUNDS	
	MAGAZINE W/ LASER SIGHT ATTACHED FOUND IN MIDDLE DRAWER CABINET IN S/W	
	BEDROOM FOUND BY 601	
04	APPROX 4.4 OZ OF ROCK COCAINE FOUND ON SOUTHWEST BEDROOM CLOSET SHELF	
	BY 601	
05	BLACK BERETTA .22 SHORT SEMI-AUTOMATIC PISTOL SERIAL #BER587551 W/MAG	
	W/7 LIVE ROUNDS FOUND ON SOUTHWEST BEDROOM CLOSET SHELF BY 601	
06	$6000 IN US CURRENCY FOUND ON SOUTHWEST BEDROOM CLOSET SHELF BY 601	
07	MISCELLANEOUS AMMO & MAGS FOUND IN SOUTHWEST BEDROOM BY 601	
08	INTERNATIONAL ARMOR TYPE II A BULLET-PROOF VEST FOUND IN SOUTHWEST	
	BEDROOM BY 601 SERIAL #87510	
09	MISCELLANEOUS PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D/601	
10	LVMPD GUN REGISTRATION CARD FOR THE DESERT EAGLE PISTOL/SHOWS REGISTERED	
	TO LASHAWN BANKS FOUND ON NIGHTSTAND IN SOUTHWEST BEDROOM BY 609	
11	GRAY MOTOROLA STARTAC 6000E SERIAL #572GXF0211 FOUND IN SOUTHWEST	
	BEDROOM BY 601	
12	6 OZ OF CRACK COCAINE IN SHOEBOX FOUND ON KITCHEN COUNTER BY 608	
13	BLUE UNICOMM PAGER FOUND ON KITCHEN COUNTER BY 607	
14	BEAKER & SCALE IN BLUE BAG FOUND IN KITCHEN CABINET BY 603	
15	APPROX 8 GRAMS OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603	
16	BABY FOOD JAR 1/4 FULL OF ROCK COCAINE FOUND IN KITCHEN DRAWER BY 603	
17	SCALE FOUND ON KITCHEN COUNTER BY 603	
18	WHITE PLATE W/RAZOR BLADE & RESIDUE ON IT FOUND ON TOP OF MICROWAVE BY	
	603	
19	MISC PAPERWORK ADDRESSED TO LASHAWN BANKS AT 1404 HENRY #D	
20	FOUR MISC PHOTOS	

The above listed items were seized pursuant to the accompanying court ordered search warrant.

TIME STAMP	NORTH LAS VEGAS POLICE DEPARTMENT NARCOTICS DIVISION WARRANT SERVICE PLAN	

DATE: 07/15/98	CASE #98-11333	SCOUT:B. Walling 792	APPROVING SUPERVISOR:
LOCATION:1404 Henry #D Las Vegas, Nevada 89110			

LOCATION DESCRIPTION: 1404 Henry Drive apartment "D", City of Las Vegas, County of Clark, State of Nevada

more particularly described as a two story four-plex, tan in color with brown trim. Front door faces north.

FORTIFICATIONS/COUNTER SURVEILLANCE: Deadbolt lock

DRUG TYPE/EVIDENCE SOUGHT: COCAINE

PRIOR SERVICE: YES ☐ NO ☐	CASE #:98-11333	PRIOR INTEL AVAILABLE/ATTACHED?NO

SUSPECT/OCCUPANT INFO	PHYSICAL DESCRIPTION	SCOPE
1.BANKS/LASHAWN LOWELL	BMA, 507, 150, 11/13/78, 559-45-1618,	Yes
2.		Yes☐ No☐
3.		Yes☐ No☐
4.		Yes☐ No☐
5.		Yes☐ No☐

WEAPONS/ARMAMENTS: UNKNOWN

TOTAL PERSONS BELIEVED TO BE AT LOCATION:	MALE: 1	FEMALE: 1	CHILDREN: 1	ELDERLY:

DOGS: Yes ☐ No ☐	NUMBER:———	TYPE:———	INSIDE ☐	OUTSIDE ☐

UC OFFICER/UCINFORMATION	PHYSICAL DESCRIPTION
1.N/A	
2.N/A	

ARREST/TROUBLE SIGNAL	VISUAL:N/A	AUDIO:N/A

RADIO CHANNEL	PRIMARY CHANL 13	SECONDARY 4	UC DEVICE FREQUENCY: N/A

PERSONNEL →

Order	Name	Unit No.	Assign.	Order	Approach	Entry
1.	TOMOASSO	607	SURVEILLANCE	1.	CORRADO	WALLING
2.	SGT. JACKS	309	E-2 /MP-5/SECURITY	2.	MOE	MELGAREJO
3.	CRESPO	600	E-3/MP-5/INTR	3.	PEARSON	JACKS
4.	MELGAREJO	601	E-1/MP-5/SEARCH	4.	WALLING	CRESPO
5.	WALLING	602	E-6/MP-5/SEARCH	5.	MELGAREJO	LEON
6.	CORRADO	603	FNT CONT/AR-15	6.	JACKS	PEARSON
7.	PEARSON	604	CONT/RAM/MP-5/PRI	7.	CRESPO	
8.	LEON	606	E-5/MP5/SEARCH	8.	LEON	
9.	MOE	609	SURVEILLANCE	9.		
10.				10.		

VEHICLE APPROACH/PARKING LOCATION:	EAST ON OWENS TO SANDHILL, SOUTH ON SANDHILL TO

SPINO, EAST ON SPINO TO HENRY, SOUTH ON HENRY, PARK IN FRONT OF 1408 IN LOT ON WEST/SIDE

FOOT APPROACH TO LOCATION:	SOUTH FROM VAN TO COURTYARD OF 1404 HENRY AND WESTBOUND

TO STAIRWAY.

PRIMARY ENTRY: FRONT DOOR	SECONDARY ENTRY:EAST/FRONT WINDOW

SURVEILLANCE OFFICERs	LOCATION
1. TOMASSO	HENRY DRIVE
2.	

CONTAINMENT OFFICERs	POSITION	ASSIGNMENT
1. CORRADO	FRONT OF LINE FROM VAN	FRONT CONTAINMENT
2.		

DISTRACTION/DISTRACTION DEVICE PLAN:	NONE

DOWNED OFFICER/PERSON PLAN: OUT FRONT DOOR DOWN STAIRS TO COURTYARD TO VAN

MEDICAL/OTHER NOTIFICATIONS	LOCATION	CONTACT PERSON/CONTACT #
1.AMR	OWENS/PECOS	SGT. JACKS/
2.		

MISCELLANEOUS INFORMATION:	PEARSON WILL INITIALLY HAVE THE EYE ON THE TARGET HOUSE.

TOMASSO WILL ARRIVE TO RELIEVE PEARSON. PEARSON WILL MEET WITH RAID TEAM NEAR TARGET TO EXECUTE WARRANT.

POST SERVICE DETAILS

SCOUT: 07/14/98 WALLING/B 792	SCOUT UPDATES	SURVEILLANCE IN POSITION:	WARRANT SERVICE:

DISTRACTION DEVICE DEPLOYED: Yes ☐ No ☐	IF YES, DEVICE NO.:
FORCED ENTRY MADE: Yes ☐ No ☐	
PROPERTY DAMAGE: Yes ☐ No ☐	IF YES, PHOTOs TAKEN? Yes ☐ No ☐
STRUCTURE SECURED: Yes ☐ No ☐	

RELEASED TO NAME:	DOB:	SSN:

GUN REGISTRATION CARD
LAS VEGAS METROPOLITAN POLICE DEPARTMENT
LAS VEGAS, NEVADA

Date: 9MAY98

This certifies that on this date:

(Name) LASHAWN L. BANKS

(City) LAS VEGAS (State) NV

registered the weapon described on the reverse side of this card.

THIS CARD IS NOT AND SHALL NOT BE CONSTRUED AS A PERMIT TO CARRY SAID GUN CONCEALED. THIS CARD IS NOT TRANSFERRABLE TO ANY OTHER PERSON.

JERRY KELLER, Sheriff

Serial #: 96314132

Manufactured By: EMF / UZI

Caliber: 40SW Type: PISTOL Color: BLACK

Model: EAGLE 941RS Barrel Length: 4½"

SIGNATURE OF OWNER

C.C. Ord. 12.04.210 It shall be unlawful for any person to sell, give away, or permanently pass on to another person of any pistol, revolver or other firearm capable of being concealed unless the Transferor first registers, or causes the weapon to be registered to the new owner.

NARRATIVE SUMMARY

On July 7, 1998, Officers and Agents of the North Las Vegas Federal Drug Task Force conducted an undercover operation at 1404 Henry Drive, Apartment D, Las Vegas, Nevada, the residence of Lashawn Lowell Banks.

At the direction of the task force officers, a confidential informant purchased approximately seven point five grams (7.55 g) of "crack" cocaine from an individual inside of the aforementioned apartment who was known to the informant as "Shakes".

On July 15, 1998, Agents and Officers of the North Las Vegas Federal Drug Task Force executed a State search warrant at the Henry Drive address. Located at the apartment during the search was approximately 11 ounces of cocaine base ("crack"), 3 loaded hand guns, a bullet-proof vest, and $6,095 in U.S. Currency.

After being early advised of his rights, Banks admitted that the money, guns, and cocaine all belonged to him and that he not only sold the cocaine but used some of it for his personal consumption

Banks further advised that he would cooperate as to his admissions but declined to furnish the identify of his suppliers until he could determine if some sort of deal could be struck on his behalf through his attorney and the prosecuting attorney. Banks added that he hesitated to furnish his suppliers identity for fear of retaliation.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHWN LOWELL BANKS, DEFENDANT

[Received: Jan. 11, 2000]

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW the United States of America, by and through Kathryn E. Landreth, United States Attorney, and J. Walter Green, Assistant United States Attorney, and files a response to defendant's Motion to Suppress.

FACTS

On July 14, 1998, th North Las Vegas Police Department (NLVPD) was granted a search warrant authorizing a search. The premises to be searched was 1404 Henry Drive, Apartment "D", Las Vegas, Nevada. (App. A). The basis of the search warrant was to search for cocaine, cocaine paraphernalia and personal property which would tend to establish a possessory interest in the items seized. (App. A).

At 2:15 p.m. on July 15, 1998, NLVPD and the FBI arrived at the residence to serve the search warrant. The law enforcement personnel knocked and announced "police search warrant." After waiting a "reasonable

amount of time" a forced entry was made. (App. B). The defendant was found near the entrance to the bathroom. (App. B). The defendant was soaking wet, naked and had soap on his person. As a result of the search 290 grams of cocaine were recovered.

NLVPD Officer Will Crespo witnessed the oral advice of rights given to the defendant by FBI SA Richard Tomasso. (App. C). The defendant was then shown an advise of rights from which he read and signed. After signing the form the defendant orally acknowledged that he understood those rights. The defendant stated he would cooperate but would only answer questions which he wanted to answer. (App. C).

During the confession, the defendant admitted ownership of the cocaine, guns, money and paraphernalia found in his apartment as a result of the search. (App. C).

The defendant declined to give the names of his suppliers unless a "deal" benefitted him. Law enforcement informed the defendant they could not authorize an agreement at that time. Soon afterwards the interview ended. After the interview, the defendant was transported to the North Las Vegas Detention Center.

ARGUMENT

I. **No Violation of 18 U.S.C. § 3109 Occurred**

18 U.S.C. § 3109 is co-extensive with those protections of the Fourth Amendment. 18 U.S.C. § 3109 protects legitimate expectations of privacy, its protections and its sanctions. *United States v. Lockett*, 919 F.2d 585, 589-590 (9th Cir. 1990). The interest of safety, property and privacy are provided by the "knock and

announce" requirement of 18 U.S.C. § 3109. *United States v. Zermeno*, 66 F.3d 1058, 1062 (9th Cir. 1995).

The federal "knock and announce" statute, 18 U.S.C. § 3109, requires law enforcement officers executing a search warrant to identify themselves and state their purpose before forcibly entering a building. Absent exigent circumstances, forcible entry is justified only when there is an explicit refusal of admittance or a lapse of a significant amount of time. *United States v. Mendonsa*, 989 F.2d 366, 370 (9th Cir. 1993).

Section 3109 states:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Implicit in this provision is the requirement that the officer wait a reasonable period of time after the announcement to give the occupants a chance to grant or refuse admittance. The amount of time that is reasonable depends upon the circumstances of each case. *United States v. McConney*, 728 F.2d 1195, 1206 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984).

A failure to knock and announce constitutes a violation of the Fourth Amendment. *United States v. Becker*, 23 F.3d 1537, 1541 (9th Cir. 1994).

In the instance the case law enforcement personnel did "knock and announce" their presence and waited a reasonable amount of time before making a forced entry into the apartment of the defendant. It is apparent the

defendant did not hear law enforcement announce their presence since the defendant was alone in the apartment taking a shower. Since a "lapse of a significant amount of time" passed after announcement and entry, no violation of 18 U.S.C. § 3109 occurred. *Mendonsa*, supra at 370.

II. Defendant's Confession was Voluntary

Defendant claims due to his intoxication and excitement his confession was not voluntary. Further, the defendant claims law enforcement personnel translated the amount of drugs seized to time in prison.

The defendant's confession was voluntary. The defendant's claim of intoxication, excitement and police statements do not rise to the level of involuntariness.

> A confession is voluntary if it is "'the product of a rational intellect and free will' . . . whether [or not] a confession is the product of physical intimidation or psychological pressure [or] a drug-[alcohol-] induced statement." *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 754, 9 L. Ed. 2d 770 (1963) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208, 80 S. Ct. 274, 274-81, 4 L. Ed. 2d 242 (1960)); *Gladden v. Unsworth*, 396 F.2d 373, 380-81 (9th Cir. 1968).

Modeiros v. Shimoda, 889 F.2d 819, 822 (9th Cir. 1989).

The defendant may have been intoxicated or excited but he maintained a rational intellect and a free will. The defendant was able to acknowledge his rights and sign them after reading the advice of rights card.

He had the presence of mind to answer questions that only he wanted to answer. He also had the pres-

ence of mind to be concerned with the future consequences of his actions. Moreover, there was no indication that he was experiencing adverse effects from his alcohol use during the interview. *United States v. Kelley*, 953 F.2d 562, 565-66 (9th Cir. 1992) (confession involuntary where defendants began going through heroin withdrawal during his interview with police).

III. Defendant's Miranda Waiver Was Knowing, Intelligent & Voluntary

Defendant claims due to the alcohol use, excitement and law enforcement informing the defendant of possible prison time, the waiver was now knowing, intelligent or voluntary. The Government disagrees. Incriminating statements made by a defendant during a custodial interrogation are admissible if the defendant's waiver of his Miranda rights were voluntary and intelligent. *United States v. Andaverde*, 64 F.3d 1305, 1313 (9th Cir. 1995). Even the fact that a suspect is under the influence of drugs or medication will not necessarily render a confession involuntary if the suspect was not incapacitated. *United States v. George*, 987 F.2d 1428, 1430-31 (9th Cir. 1993); *United States v. Martin*, 781 F.2d 671, 673-74 (9th Cir. 1985). Additionally, the court must consider the totality of the circumstances, including the defendant's conduct, background, and experience. *Terrovona v. Kinchloe*, 912 F.2d 1176, 1179 (9th Cir. 1990).

As to the issue of incarceration, for the reasons previously stated, the Government continues to argue the defendant was not incapacitated. The defendant's conduct, background, and experience further supports the fact he made a knowing, intelligent, and voluntary waiver. The defendant executed a waiver of *Miranda*

rights before giving his confession. Moreover, the defendant has had numerous contacts with law enforcement where he has acquired knowledge of the consequences of any waiver of his rights. (App. C.).

Further, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the Supreme Court made crystal clear that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the due process clause. *Id.* at 170. Here, there is absolutely no evidence of police activity of any kind, coercive or otherwise. Unlike the situation in *Townsend v. Sain*, 373 U.S. 293 (1963), cited and discussed in *Connelly*, 479 U.S. at 165, any alcohol which the appellant may have consumed was not administered by the police and does not implicate any element of coercion.

Further, the defendant's excitement does not amount to coercion, nor does the fact the police truthfully informed the defendant he may face substantial time for his conduct.

The Government requests the defendant's motion to suppress be denied.

DATED this 6 day of January, 2000.

Respectfully submitted,

KATHRYN E. LANDRETH
United States Attorney

/s/ J. WALTER GREEN
J. WALTER GREEN
Assistant United States
Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the United States Attorney for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 6th , 2000 she served a copy of the attached Government's Response to Defendant's Motion to Suppress by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in th United States Mail at 701 East Bridger, Suite 600, Las Vegas, Nevada 89101-0030.

Addressee(s): Randall Roske, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106

/s/ AYLIN ALEXANDER
AYLIN ALEXANDER

SEARCH WARRANT

STATE OF NEVADA

v.

COUNTY OF CLARK

The State of Nevada, to any Peace Officer in the County of Clark. Proof by Application and Affidavit for Search Warrant having been made before me by OFFICER W. CRESPO said Application and Affidavit for Search Warrant incorporated herein by reference, that there is probable cause to believe that certain property, namely:

1. An unknown quantity of cocaine.

2. The paraphernalia commonly associated with the ingestion and distribution of the controlled substance cocaine such as scales, packaging materials and "cut," grinders, customer and source lists, recordations of purchases and sales including "owe sheets" reflecting transactions in the controlled substance cocaine.

3. Limited items of personal property which would tend to establish a possessory interest in the items seized pursuant to this search warrant, such as personal identification, photographs, utility company receipts or addressed envelopes.

is presently located at:

1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment,

tan in color with brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north.

and I am satisfied that there is probable cause to believe that said property is located as set forth above and that based upon the Application and Affidavit for Search Warrant there are sufficient grounds for the issuance of the Search Warrant.

* * * * *

* * * * *

* * * * *

* * * * *

* * * * *

You are hereby commanded to search forthwith said premises for said property, serving this Search Warrant at any time of the day at 1404 Henry Drive apartment "D", City of Las Vegas 89100, County of Clark, State of Nevada, more particularly described as a two story four-apartment, tan in color with brown trim. The front door, which has the letter "D" on the door, is on the second floor and faces north, as set forth in the Application and Affidavit for Search Warrant in support hereto, and if the property there to seize it, prepare a written inventory of the property seized and make a return for me within ten (10) days.

Dated this 8th day of July, 1998.

/s/ STEPHEN J. DAHL
STEPHEN J. DAHL
Justice of the Peace
North Las Vegas Township

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

. [Filed: Mar. 6, 2000]

MINUTES OF THE COURT
DATED: Mar. 6, 2000
2:37 pm to 4:00 p.m.

THE HONORABLE ROGER L. HUNT UNITED STATES MAGISTRATE JUDGE

DEPUTY CLERK KANDY CAPOZZI TAPE 00-3-14

COUNSEL FOR PLAINTIFF(S) WALTER GREEN, AUSA

COUNSEL FOR DEFENDANT(S) RANDALL ROSKE (Appointed)

MINUTES OF PROCEEDINGS: MOTION TO SUPPRESS (#48)

The defendant is present in custody.

The Government call WILSON CRESPO to the stand. Agent Crespo is sworn, examined, cross-examined,

further examined on redirect and re-cross, and then excused.

The Government calls WILSON CRESPO to the stand. Agent Crespo is sworn, examined, cross-examined, further examined on redirect and re-cross and then excused.

The Government call RICHARD TOMASSO to the stand. Agent Tomasso is sworn, examined, cross-examined and excused. Government Exhibit "1" and Defense Exhibits "A", "B" and "C" are marked and admitted into evidence.

GOVERNMENT RESTS.

Defense calls LASHAWN LOWELL BANKS to the stand. The defendant is sworn, examined, cross-examined and excused.

DEFENSE RESTS.

Closing arguments are heard.

The Motion to Suppress (#48) is taken under submission by the Court. A written ruling shall issue.

LANCE S. WILSON, CLERK
U.S. DISTRICT COURT

By: /s/ KANDY CAPOZZI
KANDY CAPOZZI
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANTS

[Filed: Mar. 20, 2000]

OBJECTIONS TO THE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (MOTION TO SUPPRESS EVIDENCE)

COMES NOW, the Defendant, LASHAWN LOWELL BANKS, through his attorney, Randall J. Roske, Esquire, and respectfully submits his objections to the report and recommendation of the United States Magistrate Judge on the issues presented in the Motion to Suppress filed on behalf of the Defendant. These objections are supported by the attached memorandum of points and authorities.

DATED this March 20, 2002.

/s/ RANDALL J. ROSKE
RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for LASHAWN BANKS

MEMORANDUM OF POINTS AND AUTHORITIES

On March 6, 2000, Magistrate Judge Roger L. Hunt held an evidentiary hearing on the Defendant's Motion to Suppress Evidence. This motion sought suppression of the tangible and intangible fruits of the search conducted on Mr. BANK'S apartment on July 15, 1998. In the magistrate's rendition of the facts in the introduction, it erroneously states that "a search warrant was issued on July 14, 1998" (emphasis supplied). The search warrant int his case was in fact issued on July 8, 1998, by Justice of the Peace Stephen J. Dahl. This error was first presented in the government's response to the Defendant's motion. The second misstatement of fact is that the "law enforcement officers of the Las Vegas Metropolitan Police Department entered the Defendant's home at 1404 Henry Drive, Apartment D, Las Vegas, Nevada." (Emphasis supplied). Officer Wilson Crespo clearly identified himself as a member of the North Las Vegas Police Department. In the government's response the government stated "the North Las Vegas Police Department (NLVPD) was granted a search warrant . . ." (Emphasis supplied). It appears that the genesis for the error was caused by the magistrate's reliance on the erroneous location setforth in the government's response. There it identifies "1404 Henry Drive, Apartment D, Las Vegas, Nevada" as the place to be searched. (Emphasis supplied).

More troubling than the recitation of wrong dates for the search warrant's issuance, the law enforcement agency involved and correct city where the search was executed, is the Magistrate's analysis of the facts. No focus was given to the absence of any justification for utilizing force after a mere 15 to 20 seconds after the "knock and announce." Mr. BANKS testified that the

only thing he heard in the shower was the noise caused by the forcible entry into the apartment. There was absolutely no evidence of an explicit refusal of admittance adduced at the evidentiary hearing (which would justify a forcible entry). It is also logical and obvious that Mr. BANKS having been in the shower would need additional time to answer the door.

The Magistrate also ignored the coerciveness of the interrogation being concluded contemporaneously with the search of the apartment. Mr. BANKS related that as items were located he heard the officers announce how much time he was facing. The Magistrate talks about the totality of the circumstances as relevant to the analysis, but does not explain how or why the obvious excitement of having been thrown to the floor naked by hooded men armed with tactical grade weaponry did not present a significant element of coercion. It is necessary to note that the officers were white and that the Defendant is black. There is an unfortunate and shameful history in this country of abuse and even lynching of black people by white people wearing hoods. This too, adds to the totality of coerciveness prevailing the interrogation.

Mr. BANKS explained how the FBI agent interrogating him was playing the "good cop, bad cop" routine on him. Mr. BANKS' explanation of his use of alcohol and drugs that day and evening affected his ability to reason. Mr. BANKS expressed his fear that the officers would take him out of the apartment without proper clothing thereby using his public parade as a further tactic of humiliation.

Former Special Agent Dick Tomasso testified that Mr. BANKS was "very calm" during the interrogation. It is quite possible that what the former agent de-

scribed as being "very calm," despite having been placed in custody at gun point while law enforcement was ransacking his apartment for drugs and weapons, was evidence of drug/alcohol intoxication. In the Magistrate's discussion, he concludes that the officers in this case "complied with the know and announce requirement of [Title] 18 U.S.C. § 3109 and that the officers did not violated the Defendant's constitutional rights when they entered the Defendant's apartment." The Magistrate reasoned that the failure to answer the door in 15 to 50 seconds equate as a refusal of admittance (*Id.*). Factually, the instant case presents an excellent example why waiting a mere 15 to 20 seconds before concluding that there is a refusal of admittance, is an unjustifiably too brief a period of time. Here, Mr. BANKS was in the bathroom in a shower. Reasonably, how is one expected to get out of a shower and answer the front door in less than 20 seconds. The answer is that it is not reasonable logistically or under the Fourth Amendment. The Magistrate quotes *United States v. Phelps, 490 F.2d 644 at 647 (9th Cir. 1979)* for the proposition that "The Ninth Circuit has upheld the validity of searches where the delay was ten seconds or less." The *Phelps* case however noted that "There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case. *United States v. Phelps, 490 F.2d 644 (9th Cir. 1974)* (emphasis supplied). The Magistrate goes on to point out that in *Phelps* the search was upheld where there was a 10 second or less delay coupled with the "hearing of movements inside" and the case *United States v. Allende, 486 F.2d 1351, 1353 (9th Cir. 1973)*, where the officers waited a mere ten seconds, but heard "scampering," Here, there was no testimony of any movement, noise or "scampering"

had been noticed. The facts that gave rise to concerns of destruction of evidence or flight are entirely absent from this record. There, therefore, exists no good reason for the resort to forcible entry after a mere 20 seconds (or 15 as testified by Officer Crespo).

The mere fact that the search warrant sought evidence involving drugs, does not mean that Fourth Amendment concerns disappear. The Magistrate provided no authority for his conclusion that "considering . . . that the warrant authorized a search . . . for cocaine . . . the lack of response . . . within fifteen to twenty seconds" justified the use of a battering ram to gain entry.

Turning now to the Magistrate's Report at page eight, he concludes that the "Defendant's actions indicated that the was capable of making reasoned decisions. The Magistrate comes to this conclusion after acknowledging "that intoxicating substances may impair an individual's senses, a decision to waive one's rights or confess is voluntary if it's the product of a rational intellect." The Magistrate is required to look to the totality of the circumstances in making a decision that a confession is or is not voluntary. Here, Mr. BANKS is in the shower intoxicated. He hears a bang so loud as to make him thing that the door has been shot out by some explosive. He stands naked, covered in suds, as hooded men armed to the teeth rush in. Mr. BANKS is pinned to the floor by an armed hooded man. Mr. BANKS does not know whether he is being robbed or arrested. All he knows is one false move could cost him his life. Naked and covered with suds he is taken to the kitchen area at gun point. He is then interrogated by a man in plain clothes who, in Mr. BANKS opinion, plays the role of a good cop in a good cop/bad

cop scenario. Mr. BANKS is distracted by the shouts of searching officers describing what they found and how much time he is facing. Mr. BANKS is confronted with drugs and interrogated as to whether the drugs are his and whether he's selling. Mr. BANKS signs forms he believes are consent forms to search his car, instead of *Miranda* right/waiver forms. Mr. BANKS makes various admissions, but when told he must give up his sources or spend his future in jail, invokes his Sixth Amendment right to counsel.

The Magistrate concludes that Mr. BANKS knowingly waived his rights based upon his ability to follow instructions and carry on conversation. The Magistrate also points to the fact that Mr. BANKS asked to have his girlfriend called to secure his apartment. Apparently, Mr. BANKS' rational decision not to resist overwhelming force (armed men in tactical assault gear) and to follow their instructions (at gun point), proves he was of sound mind. This author submits that at best, all of this shows his survival instincts were intact. The fact that his apartment had not functioning door was obvious to all and if he were to have any personal property left before a new door/door jam was installed, someone would have to be there. This realization again does not take a high degree of mental functioning.

The Magistrate ignores the facts showing the coerciveness of the setting. He ignores the Defendant's own testimony of impairment after ingesting crack cocaine, marijuana and hard liquor. Mr. BANKS did not, or could not, sleep the night before which also attests to his intoxication by a powerful stimulant, crack cocaine.

Lastly, the Magistrate concludes that Mr. BANKS' invocation of his Sixth Amendment right to counsel constituted no *Miranda* violation. This points out that since *Miranda v. Arizona, 384 U.S. 436 (1966)* was decided, no further questioning of a suspect can occur after he expresses a wish to consult with counsel. 384 U.S. at 474. To reach this conclusion that there was no *Miranda* violation, the Magistrate points to Ninth Circuit case dealing with "ambiguous or equivocal requests for an attorney" citing *United States v. Fouche, 833 F.2d 1284 (9th Cir. 1985)*. The problem from this author's point of view is that at some point during the interrogation, Mr. BANKS indicated wished to consult with counsel. That was not an equivocal invocation of the right to counsel. He did not further initiate interrogation. What is clear is that despite his unambiguous request to consult with counsel, is that interrogation continued. For this reason, his statements after this point must be suppressed. This is the teaching of the *Miranda* decision and the Magistrate is not free to alter its affect.

CONCLUSION

Wherefore, in light of the Fourth Amendment knock and announce violation, the tangible and intangible fruits of the poisonous tree. Additionally, Mr. BANKS post arrest statements were involuntary and should be suppressed under the Fifth and Sixth Amendments to the United States Constitution and the *Miranda* decision.

DATED this March 20, 2000.

/s/ RANDALL J. ROSKE
RANDALL J. ROSKE, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for LASHAWN BANKS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. That on March 20, 2002, she served a copy of the above and foregoing Objections to the Report and Recommendation of the United States Magistrate by placing said copy in a postpaid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Las Vegas, Nevada or by hand delivery.

Addressee: United States Attorney
701 E. Bridger, Suite 300
Las Vegas, NV 89101

Helena Bozzo

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
Las Vegas, Nevada

DOCKET NO. CR-S-98-269-JBR(RLH)

UNITED STATES OF AMERICA, PLAINTIFF

v.

LASHAWN LOWELL BANKS, DEFENDANT

Las Vegas, Nevada
March 6, 2000
2:37 p.m.

HEARING ON DEFENDANT'S MOTION TO SUPPRESS

THE HONORABLE ROGER L. HUNT PRESIDING
UNITED STATES MAGISTRATE JUDGE

TRANSCRIPTION BY:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

[2]

APPEARANCES:

FOR THE PLAINTIFF: WALTER GREEN
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Las Vegas, Nevada 89101

FOR THE DEFENDANT: RANDALL J. ROSKE
516 South Sixth Street, #300
Las Vegas, Nevada 89101

[3]

PROCEEDINGS BEGIN AT 2:37 P.M.

THE COURT: Please be seated.

THE CLERK: United States of America versus Lashawn Lowell Banks, Criminal-S-98-269-JBR(RLH). This is the time set for the hearing on the motion to suppress.

Counsel, please note your appearances for the record.

MR. GREEN: Good afternoon, sir, Walt Green for the United States.

MR. ROSKE: Your Honor, Randall Roske for Lashawn Banks.

THE COURT: Are we ready to proceed?

MR. GREEN: Yes, sir, we are.

MR. ROSKE: Defense ready, Your Honor.

THE COURT: All right. You may call your first witness, Mr. Green.

MR. GREEN: Yes, sir. We'd call Officer Will Crespo.

WILSON CRESPO, PLAINTIFF'S WITNESS, IS SWORN

THE CLERK: Thank you. You may be seated. Please state your name for the record and please spell your name.

THE WITNESS: Wilson Crespo, W-I-L-S-O-N C-R-E-S-P-0.

THE COURT: You may proceed.

MR. GREEN: Thank you, sir.

[4]

CRESPO — DIRECT

DIRECT EXAMINATION

BY MR. GREEN:

Q Officer Crespo, what do you do for a living?

A I'm employed with the North Las Vegas Police Department as a North Las Vegas narcotics officer.

Q Officer Crespo, on July 15th of 1998 were you on duty?

A Yes.

Q And did you come to the residence at 1404 Henry Drive, Apartment D, here in Las Vegas?

A Yes.

Q Whose apartment was that?

A Lashawn Banks.

Q Did you come upon a time later to see Lashawn Banks?

A Yes.

Q Can you identify him?

A Yes.

Q Could you tell us what he's wearing, please?

A He's the gentleman wearing the—looks like a gray jacket and brown clothing.

MR. GREEN: Sir, I'd ask that the record so reflect he's identified the defendant.

THE COURT: It will so reflect.

BY MR. GREEN:

Q You arrived there approximately 2:00 o'clock that afternoon, is that correct?

[5]

CRESPO—DIRECT

A Yes.

Q And why did you arrive there?

A We were serving a state search warrant.

Q What was your role in serving the search warrant?

A I was case agent.

Q When you began to make entry into the apartment, where were you?

A I was with the entry team.

Q Where was the entry team stationed?

A We were stationed outside of the apartment going up the stairs—the stairs.

Q Can you tell us step by step what you did once you got to the door, your group did?

A Yes. We knocked, we announced "police search warrant," and we waited.

Q How long did you wait?

A At least fifteen seconds.

Q Why did you wait so long? Have you had previous training in this area?

A Yes. I've been told by federal officers, special agents, that that gets challenged a lot in court, the knock and announce, and that if we were going to serve a search warrant and the possibilities are that it could possibly go federal, that we should take into account of knocking and announcing and waiting a reasonable amount of time before making entry.

[6]

CRESPO—DIRECT

Q Were you knocking in a loud fashion?

A Yes.

Q And what kind of tone were you using when you were yelling?

A A loud tone, authoritative tone, I guess.

Q Did you hear anything come back from the—from inside the apartment?

A No.

Q How did you make entry into the apartment?

A A forced entry was made.

Q How was that?

A One of the—one of the officers in the entry team used what we call a ram to force the door—force the door open.

Q Did you enter the apartment afterwards?

A Yes.

Q When did you first see the defendant?

A I saw him in the hallway near the bathroom area.

Q Where was—how was he dressed?

A He was naked.

Q Can you describe his body for us?

A Yeah. He was naked, he was wet, and it appeared that he had soap on his body.

Q Were you able to tell which direction he was coming from—

A It—

[7]

Q —in the apartment?

A It appeared to me that he was coming from the bathroom.

Q Did you give the defendant some instructions at this point?

A Yes. We yelled, police or search warrant, when we were entering the apartment, and as soon as we saw him, we yelled, get down on the ground, get down on the ground, and he got on the ground immediately.

Q Was he able to follow your instructions?

A Yes, he followed the instructions. He was taken into custody without incident.

Q Is this when you handcuffed the defendant?

A Yes. He was cuffed.

Q Did you place him anywhere in the apartment?

A Yes. We placed him at the table after he was taken into custody near the kitchen.

Q Did you witness his rights being read?

A Yes.

Q Did you watch him execute his rights waiver?

A Yes.

Q Who went over his rights with him?

A Special Agent Tomasso.

Q Based upon your observations, was the defendant able to understand what was going on?

A Yes.

[8]

Q Was he able to follow your instructions?

A Yes.

Q Was he able to carry on a conversation?

A Yes.

Q Was he able to respond to questions?

A Yes.

Q And answers?

A Yes.

Q Did you smell any alcohol on the defendant?

A No.

Q Were you in close contact with the defendant so you would have been able to?

A Yes.

Q Did you find any empty liquor bottles in the apartment?

A No.

Q Did you do a search of the apartment?

A Yes, we did.

MR. GREEN: No further questions, sir.

THE COURT: You may cross-examine, Mr. Roske.

MR. ROSKE: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ROSKE:

Q Now, Officer Crespo, isn't it true that you—you had no idea whether this matter was going to go federal or not at the time you executed the search warrant?

[9]

A No, that's not true.

Q You had an idea, correct?

A Yes.

Q And the idea was it would go federal?

A No, that's not true either.

Q Well, why don't you explain to me what was the status, then, at the time of the search?

A Okay. Yes. The status was that we only—at the time we had a buy into the apartment and we only had enough for a state search warrant, we didn't meet federal requirements at the time, but according to CI information, there was a possibility that we were going to find large quantities of rock cocaine that could

possibly meet federal requirements, and that's why we weren't sure if we were going to go federal or not at the time, but we knew the possibility was there.

Q So, quantity was the deciding factor?

A Not necessarily.

Q What other factors are there other than—

A There could—

Q —quantity of drugs seized?

A There could be many factors, weapons, guns, things like that, weapons, guns, and other drugs being found, other quantities of drugs or the types of drugs. So, just quantities alone wouldn't have been enough.

Q Now, when you effected entry, the defendant, you say, was

[10]

in the hall and dripping wet and apparently coming towards the door when—when you effected your entry with the battering ram?

A Yes.

Q And did he seem surprised to see the officers entering the apartment?

A They always—everyone always seems surprised. I would—I would—I would think so. I would be surprised if someone came in and had a gun.

Q And did you actually have your weapon drawn?

A Yes, we did.

Q And what kind of weapon do you use?

A MP-5 semiautomatic weapon.

Q And—

A Automatic, it goes also automatic, I should say.

Q Well, which—you can't tell by looking at it whether it's automatic or—

A No, it is. It can go either way, the way the trigger group is. You can—you can—it could go semiautomatic or it can go automatic.

Q Were you the only officer that was armed that did the entry?

A No. We all were armed.

Q Now, upon your entry, Mr. Banks was standing there in the hallway, I take it. It was obvious that he wasn't armed,

[11]

CRESPO— CROSS

right?

A Yes

Q But you ordered him to the ground. Now, did you at that point—well, let me ask you. Were you dressed in an undercover fashion, are you wearing SWAT uniforms? Were anybody hooded?

A Yes. We were hooded and we had our, what you refer to as SWAT uniforms.

Q Okay. And—

A And I'm taking that you're saying with the black and the vest that say, "Police," and the tactical gear, that that's what you're referring to.

Q All right. And everybody that made the forced entry were—they were attired in that garb?

A I wouldn't say everybody.

Q Well—

A Everybody in the—on the task force that's with the North Las Vegas Police Department. The FBI special agents may have worn their vests that said "FBI" on it.

Q Okay. But in the entry team, they were all dressed with the hoods and the—

A Yes. Most, not all, again.

Q Okay. How many officers entered the apartment there on the 15th of July?

A I couldn't give you an exact number. It was numerous, I [12] Know that.

CRESPO—CROSS

Q Would it be more than five?

A Yes.

Q Now were there any females in the team?

A Not that I recall. No.

Q Now Mr. Banks was, as you say, naked, and he was cuffed and then sat down at the—at the table. At what time did it come, or did the ever come a time when he was given some clothing?

A I think he was given something to cover up immediately, to cover himself up. I'm, positive that we didn't leave him there. We would never do anything like that, leave him there naked. That's not—

Q Did—

A —the way we practice. That's not what we practice. We just wouldn't do that.

Q All right. Did you have the opportunity to ask Mr. Banks to consent to have a test done on his urine or blood?

A No. Don't recall anything like that.

Q Okay. But you agree that you could have done that? I don't—I don't see why we would have asked him that.

A That's not—I don't know what—what the purpose would be behind that. So, no, I don't see why we would ask him that.

Q Well, you're aware that there's a state statute that proscribes people from being under the influence of controlled [13] substances?

A Yes, I'm aware of it.

Q That's a state felony?

A Yes, I'm aware of that.

Q That when you came into the apartment, you would agree that you—well, maybe not you personally, but, but members of the team conducted a search, correct?

A Yes.

Q And that search revealed quantities of what you believed to be cocaine?

A Yes. Large quantities. Yes.

Q So, it would certainly have risen into your mind the possibility that he might have used cocaine?

A No, that wasn't—that wasn't a consideration.

Q He—

A I can explain it to you, if you like, why that wasn't a consideration.

Q It wasn't a consideration?

A Yes.

Q Why wasn't it a consideration?

A the reason it wasn't a—

Q MR. GREEN: Sir, if I could, I would just object to this line of questioning. It's not relevant to the defendant's motions and issues that he brought up. I think his issues were excitement, alcohol, and no knock and announce, [14] so I don't know what basis this would have into the questioning of his motion.

THE COURT: Overruled. I'll hear what he has to say.

BY MR. ROSKE:

Q Could you answer the question, Officer?

A Yes. Again, the reason that wasn't done was we weren't charging him—we were charging him with what we found in the apartment, and we didn't—we were going federal with the large quantities of cocaine that were found, and that's what he was being charged with.

Q All right.

A So, that was never a consideration.

Q Do you—do you believe it's likely that people that sell drugs might use drugs?

A It could be—yeah, it could be likely, yes. It could be like—a lot of things could be likely where people sell drugs.

Q Okay. Well, was there anybody else developed as an occupant at the apartment?

A I'm not sure. I can't recall.

Q All right. When—

A I know we had a phone bill in someone else's name. I think there was a phone bill or some kind of bill that was found in someone else's name also in that apartment.

[15]

Q When you—is it safe to say that when you came in to conduct the search, you weren't looking for liquor bottles?

A Yeah, it's safe to say that.

Q In fact, your warrant didn't specify you to look for bottles that might have been alcohol bottles, right?

A Yes.

Q You wouldn't inventory them either because you're not looking at them, you wouldn't seize them?

A Yes, sir.

Q All right.

A You're right.

Q Now would you agree that normally a person who is subject to a forcible entry such as this case would be exited?

A Yes.

Q Would you have an adrenalin rush—

A Yes.

Q —In their body?

A Yes.

Q Would you agree that this would take them hopefully off guard?

A Right. Yes.

Q And—

A Temporarily off guard. I wouldn't go totally off guard for a long period, it's just temporarily off guard.

Q Well, wasn't it true that an interrogation occurred in [16] the apartment?

A I wouldn't call it an interrogation.

Q What would you call it?

A An interview.

Q Okay. And did you provide Mr. Banks with a statement to fill out in handwriting?

A Special Agent Tomasso did, yes.

Q And he did that?

A Yes, he did.

Q And he had good penmanship?

A I'm sorry, maybe I'm mistaking your question. I know I'm—can you repeat your question? Are you talking about—

Q Do you recall whether a voluntary statement was provided?

A Not a voluntary statement.

Q A blank form?

A No, no, not that. No. I was thinking the advisement of rights—

Q Oh, okay.

A —form. I apologize.

Q All right. And—but he wasn't provided with a voluntary statement to write out?

A No, he—no, he was not.

Q And if he had been provided with a voluntary statement to write out, if he had intoxication, that might have been evident in his handwriting?

[17]

MR. GREEN: Objection, sir, it's speculation. He's already said he didn't give a statement.

THE COURT: Sustained. I think we are getting into a very speculative area, counsel.

MR. ROSKE: All right.

BY MR. ROSKE:

Q But in this case, did you have a tape recorder with you to record the interview process?

A That's—that's not our common practice to do that.

Q Why isn't it your common practice?

A The reason a lot of that—the tape could become discovery, and a lot of times in a drug case we try to ask the defendants or the people that we arrest to give us information on their suppliers, and for their safety, that's one of the main reasons in the North Las Vegas Police Department we don't record.

Q Okay. So, if you—if you're to make a written statement, that's not discoverable, but if it's in a tape-recorded form, it is discoverable?

A No, I didn't say that. I didn't say that.

Q So, you have a written policy on that point?

A No. I say it's our common practice.

Q Oh. And—but you—would you agree if we had a tape recording of the interview process, we could hear the tone of voice that was used?

[18]

A Yes—yes—yes, that's true. You could.

Q You could hear the volume of the voice that was used?

A Yes.

Q If there were something coercive about the questioning process, that would have been revealed by a tape?

A I don't know. It all depends. It's—it's a lot of—

Q Well, wouldn't a tape have been the best evidence of what we said at that interview?

A Again, I'm taking the safety of the person—we take the safety of the person that we're interviewing into consideration when we do these interviews because we know a lot of these interviews go into other things that the people talk about. So as far as people they're going to give up, and that turns into their safety, so, no, that's the main reason we don't record.

Q But you do use the recording technique when you have somebody go in and make a buy, perhaps, have a wire on?

A Yeah. That's totally different. That's totally different.

Q Well, it's more important to have the recording of the buy than it is in the interview then?

A No, that's not the case. That's not—that's not what I'm saying at all.

Q Was Mr. Banks sweating?

A I couldn't tell, he was—just came out of the shower.

[19]

Q Did he appear nervous to you?

A No, not after—not during the interview. No.

Q Do you recall any officers telling him, well, look at this. That's going to be ten years right there?

A No, I don't recall that. I don't recall that.

Q You don't recall any effort to ascribe a sentence for amount of quantity during the search process while Mr. Banks was seated at the kitchen table?

A Can you rephrase your question? I'm—again, I'm confusing what—

Q Well, are you—

A —you're asking me is.

Q —familiar with the sentencing guidelines?

A I am somewhat familiar, yes.

Q Are you familiar with mandatory sentencing under federal statutes?

A I'm somewhat familiar, yes. I know there's—there are minimums. I couldn't give you the exact minimums—

Q All right.

A —on each, but I know there are minimums.

Q You understand that when you get to a certain quantity, then a certain quantity applies?

A Yes.

Q Applies to that—that defendant?

A Yes.

[20]

Q And you don't recall any discussion about that being made?

A There may have been some discussions on that being made by Special agent Tomasso. Yes.

Q Okay. And the fact that these quantities were being maybe translated by Agent Tomasso into time, do you recall any years that were mentioned?

A No, I don't.

Q Now no Breathalyzer was administered to Mr. Banks?

A No. We—we—we don't do that. We've never done that.

Q Would you agree that the police department has portable breath samplers? Testers?

A Not for the narcotics units. No.

Q All right. Could you have called a unit over that had one?

A Yes, I could have done that.

Q All right.

A But we don't do that, so that's why we didn't do it.

Q Okay. You don't do that. Now you didn't obviously do any field sobriety test either, did you, at the—at the apartment?

Q There was no need for it. He wasn't driving drunk or anything, so , we didn't feel the need. That's the only time that we do field sobriety tests in our department is if [21] they're driving drunk.

A Well, is it safe to say that you had no idea what Mr. Banks had ingested prior to your making entry into the apartment?

Q Oh, yeah, it's safe to say that. I would never know that. No. I wouldn't know what anyone has ever—has ingested when I go into their apartments.

Q And it's safe to say that you would have no idea how he felt during the process of this investigation when he was in the—

A What do you mean, how he—

Q —in the kitchen?

A What do you mean how he felt, like his feelings on—I don't understand.

Q Intimidated or not?

A I don't know how he felt. I don't—couldn't tell you what he felt.

Q Now, you were in the apartment for some time, weren't you, with Mr. Banks doing the search?

A Yes, sir, we were.

Q And that probably totaled, what, forty-five minutes?

A That's a good approximation, may be a good approximation.

Q Was Mr. Banks afforded an opportunity to call counsel?

A No, he never asked for it.

Q Would you agree that one of the efforts that was made [22] during the interrogation was to identify his supplier?

A Yes. That's our common practice.

Q And, in fact, that was what, I guess, your concern was about the—this thing becoming part of discovery as to what people he wanted to give up?

A Yes.

Q Now, did you make notes of what was being said, or did somebody else make notes?

A There's is a possibility that Special Agent Tomasso did.

Q Okay. But then you didn't personally take—

A No, I did not

Q —any rough notes?

A No, I did not.

Q Did you have a chance to review Agent Tomasso's 302?

A Yes, I have.

Q Okay. And did you rely on that to refresh your recollection prior to testifying here today?

A Yes.

MR. ROSKE: Pass the witness.

THE COURT: Any redirect?

MR. GREEN: Yes, sir. Just very briefly.

REDIRECT EXAMINATION

BY MR. GREEN:

Q Was the shower on or off by the time you made entry into the apartment?

[23]

A The shower was off.

Q Now did you—after you restrained the defendant, did you find some guns in the apartment?

A Yes. Guns were found in the apartment.

Q As you were making entryway into the apartment, were people identifying themselves the entire time?

A Yes. Yes. People were identifying—the team was identifying itself.

Q Did you say it many times where—

A Yeah. We say it numerous times as we go in. It's continuous until the—until the entire place is secure. We continue to yell, " police, search warrant, " so, if anyone who doesn't hear us, will hear us as we go in.

Q Do you have any reason or any indications that the defendant was drunk at the time?

A No.

Q And can you describe his demeanor once the interview process began?

A His demeanor was good. He spoke well, his speech wasn't slurred, which would give me any indication that he was drunk, or maybe under the influence of any controlled substance or any substance whatsoever. He spoke clearly. Again, his speech wasn't slurred, his eyes weren't red, his—they weren't droopy or anything to give me any indication that he was either drunk or under the influence of any type of [24] controlled substance.

Q Did you transport the defendant to the jail?

A No, I don't recall transporting him.

Q dO you know if they have procedures about anyone who appears intoxicated?

A Yes. Our jail, if someone is too intoxicated, they won't take 'em.

Q And do you know if that happened to the defendant that night?

A He was—he was arrested. He was booked.

Q So that—

A He was not—he was not released.

Q Thank you.

MR. GREEN: No further questions, sir.

RECROSS EXAMINATION

BY MR. ROSKE:

Q Now, Officer Crespo, if I'm to understand your redirect, if somebody is, say, arrested for public drunkenness, they don't get booked in the jail?

A I don't—no, not for public drunkenness, no. It's a safety thing. And under his situation, he wasn't driving drunk—

Q Well, I don't know he wasn't driving—

A —If that was the case.

Q —drunk, but you're saying that if he got to the jail [25] and he was intoxicated, that they wouldn't accept him?

A No, they wouldn't accept him. If he was driving drunk, yes, he would be accepted.

Q And are you saying that if he's arrested for drugs and he doesn't grossly be—if he's not falling down intoxicated, then they have to take him?

A Yes, they have to take him.

MR. ROSKE: Pass the witness.

MR. GREEN: No further questions, sir. Thank you.

THE COURT: Is this witness excused?

MR. GREEN: Yes, sir, he is.

THE COURT: You may step down, Officer. Thank you.

MR. GREEN: We'd call Special Agent Dick Tomasso, sir.

RICHARD TOMASSO, PLAINTIFF'S WITNESS, IS SWORN

THE CLERK: Thank you. You may be seated. Please state your name for the record and please spell your name.

THE WITNESS: It's Richard Tomasso, T-O-M-A-S-S-O.

DIRECT EXAMINATION

BY MR. GREEN:

Q Mr. Tomasso, have you recently retired from the FBI?

A Yes, sir, I did.

Q And when was your retirement to take effect?

A It took effect January 31st of this year, 2000.

Q Mr. Tomasso, were you still on duty on July 15th of '98?

[26]

A Yes, sir, I was.

Q Did you have an occasion to execute a search warrant at 1404 Henry Drive, Apartment D, here in Las Vegas?

A Yes, sir.

Q What was your role before the entry of that apartment was made?

A I think I was on surveillance of the apartment until the entry team rolled up, and then my duty was to cover the exit windows as they made entry.

Q You took position right outside the apartment, is that correct, Mr. Tomasso?

A Outside—the back and side. Yes, sir.

Q Did you hear the team try to make entry into the apartment by knock and announce?

A Yes, sir, I did.

Q Approximately how long, to the best of your recollection, was it before you heard them make forced entry?

A Well, I would say pretty close to about, I think, twenty seconds, maybe.

Q Is that unusual for it to be that long?

A I thought so. I was out watching the windows, and I thought he had—they were waiting so long that he had a chance to escape to me where I was.

Q When did you first make entry into the apartment?

A Oh, I followed 'em in, maybe seconds, half a minute to a [27] minute after they got in and I heard the clear sign.

Q Did you see Mr. Banks?

A Yes, I did.

Q When was the first time you saw him?

A He was standing right in the kitchen area with, I think, a towel wrapped around him and handcuffs.

Q Did you have him placed somewhere?

A I had him moved to the kitchen and placed in a chair.

Q Was he able to follow instructions at that point?

A Oh, yes, sir.

Q Did you ask him any questions, then, Mr. Tomasso?

A Well, I—myself and officer Crespo a couple minutes later went over and began to interview him.

Q Did you question him about, or ask him about if he wanted to waive his rights?

A Oh. Oh, yes sir. I—the very first thing I did when I approached the kitchen table with Officer Crespo was to advise him of his rights.

Q Did you do this orally, or by a statement?

A I did it both. Actually, I orally advised him and then I took out an advice of rights form which I gave to him to read and went along with it when I gave it to him.

Q Did you sign this form?

A Yes, sir, I did.

Q Did you witness Lashawn Banks sign this form?

[28]

A Yes, sir, I did.

MR.GREEN: Sir, if I could approach?

THE COURT: You may.

MR.GREEN: Sir, this is previously marked as Government Exhibit 25, which is a trial government exhibit. I'll have it remarked as 1 for the motion hearing.

THE COURT: So, for this hearing, it's Exhibit 1?

MR. GREEN: Yes, sir. I'd ask, absent any objection, it be admitted into the record at this time, sir.

MR. ROSKE: No objection.

BY MR. GREEN:

Q Could you tell us what that is, please?

THE COURT: It will be admitted.

(Plantiff's Exhibit No. 1 admitted)

MR. GREEN: Thank you, sir.

BY MR. GREEN:

Q Could you please tell us what that is?

A This is the advice of rights form which I presented to Mr. Banks for him to read.

Q Is your signature on there?

A Yes, sir, it is.

Q Is Mr. Banks?

A Yes, sir.

Q Is anybody else's on there, Mr. Tomasso?

A Officer Crespo who conducted the interview with me.

[29]

Q Can you describe for us how you go about advising someone of their rights?

A After I orally advise him, I identify myself and tell him who I am and why we're there, and identify myself. Then, I orally advise him of his rights and tell him I intend to—I'd like to interview him, but before I start I ask him to read the advice of rights form and make sure he understands it and asks if he signs it, if he would like

to sign it that he understood it. Sometimes, they say yes, sometimes they say no. In my thirty—one years with the Bureau, I usually go over it with 'em to make sure they understand it.

Q Well, do you read along with them? Is that how you do it?

A For the most part, I usually do. I can't remember a time I don't actually cover it. Because I don't have it committed to memory, I just read along with them.

Q Is that your standard practice to do that?

A Yes, sir, it is.

Q To your memory, did the defendant acknowledge these rights?

A Yes, sir, he did. In fact, at the part—at the part on the advice of rights form where it says:

> "If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time."

[30]

At that point he stopped me and said, well, I would like to cooperate and I will answer some of your questions, but there are some that I don't—really would not like to answer. So, I said, that's fine, and so I know that he understood what I was saying at that point.

Q What was his demeanor like during the interview?

A Very calm, actually. It was very—it seemed like very calm, informal, not agitated or anything.

Q Was he able to follow your instructions?

A Well, he appeared to follow them fine.

Q Was he able to answer your questions

A Yes, sir.

Q And he made such request?

A Well, he would ask me questions back and forth. We would exchange questions. Yeah.

Q Near the end of the interview, was he able to make a request upon you?

A Oh, yes, sir. He asked if he could contact a girlfriend of his to come over and stay in the apartment while he went off to the detention center because he was—wanted it secured, and we told him, fine.

Q Did the defendant ever slur any of his words, give you any indications that he was intoxicated or under the influence of drugs?

A Oh, no, sir.

[31]

Q Did you ever—to your memory, did you ever say anything to the defendant concerning the amount of drugs and what may happen to the defendant?

A Well, what happened was, see, this was a—began as a state case, but in speaking to Officer Crespo, I knew that it could possibly be taken through the federal system depending on what was found in the apartment, and so I told him that this case could possibly go

through the federal court system rather than the state, and if it did, he—in order to secure his cooperation, we told him we would like him to cooperate because in the federal system it's a little bit tougher on the drug dealers than it is in a state system.

Q And what was his reply?

A The first response was, well, what kind of deal can you cut me? I think he asked that. What were we talking about for a deal? And when I explained to him, well, it wasn't up to me, that it would still be up to the judge, really, but it would be made known to the prosecutor and the court, his response at that point was, well, maybe I'd better talk to an attorney before I strike a deal. That's it in a nutshell without me referring to my report.

Q Right. And did you tell him what was going to happen to him that day regardless of whether he cooperated or not?

A Oh, no, no, yeah, of course. I told him that regardless if he cooperated on the spot or not, he was going to jail, I [32] mean, there was—he wasn't getting out of jail.

Q Thank you.

MR. GREEN: No further questions, sir.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

BY MR. ROSKE:

Q Agent Tomasso, you were dressed in street clothes that day on the 15th of July, 1998?

A Yeah. Street clothes, you mean, just a sport shirt, jeans, type of thing or a suit?

Q Right. Or were you wearing a SWAT or FBI jacket or, what were you wearing?

A I was dressed in—huh. You know, I'll be honest with you, I don't know exactly if I was wearing jeans or sport pants or what, but I did have an FBI vest on, a protective vest. I would always wear that.

Q Was it a bulletproof vest?

A Oh, yes, sir. FBI bulletproof vest.

Q Okay. And the officers that went into the apartment, they were—they were dressed in police garb, correct?

A I'm sure they were.

Q And hooded?

A Hooded. Yes, sir.

Q And did there ever come a time during the process that the hoods were removed?

[33]

A Not that I recall.

Q So, you recall that Officer Crespo had his hood on or off during the—

A I'm going to say that it was on. I never remember him taking off a hood in front of a defendant or subject at the time. I'm almost sure that it was on. If he took it off, I don't recall him taking it off. Let me just say that.

Q But you weren't wearing a hood?

A Oh, no, sir.

Q And now this was a joint task force investigation, correct?

A Yes, sir.

Q And one of the things that can happen in a joint task force case is it can go state or it can go fed, right?

A Yes, sir.

Q Prosecution-wise?

A Yes, sir.

Q And you guys apparently have your criteria for which way it will go?

A Yes, sir.

Q And depending upon whether guns were found, you could go federal with it?

A Well, yeah. I think there's other circumstances, sir, depending on how much drugs were found, depending on the criminal record of the defendant. There's—the United States [34] Attorney takes all that

into consideration. And it's their call, it's not mine. I mean, I may want to take something federal, I still need to consult the United States Attorney's Office—

Q Well, right—

A —and it's up to them.

Q —I mean, if they—if they decline a federal prosecution 'cause you've got two grams of crack, they're not interested in that, right?

A If they say no, then it's no.

Q All right. But in this case, they said, yes, right?

A Yes, sir.

Q Okay. And when you were there, you knew that this was a potential federal matter, correct?

A I felt it was. Yes, sir.

Q And your—when you went through training at the academy, you learned about various investigative techniques?

A Yes, sir.

Q One of the investigative techniques for taking statements is to offer witnesses blank forms and a pen and write it out, right?

A Signed statement?

Q Right.

A It's done on some occasions, yes, sir.

Q Well, would you agree with me that if it were in the [35] defendant's handwriting, it would be—and he were allowed to read it over and make corrections, that'd be a pretty solid record of what was said by the defendant?

A Would I agree to that? It depends, sir. I've given paper and pencil to defendants in the past and they sit there and what starts out to be a signed statement or confession turns out to be self serving statements denying guilt and excuses and alibis. So, what—what do you mean?

Q Well, I mean, it certainly would—

A I mean, I wouldn't sit there—

Q —I mean, you—it may not be subjectively, in your mind, accurate, but it would certainly be an excellent record of what the defendant actually said, whether it was denial or—

A Oh, okay. Yes, sir.

Q —you know, refuting, or—

A I see. I see what you are saying. Yes, sir.

Q —quibbling about whether he was it or not, right?

A Yeah. I see what you are saying. Yes, sir.

Q Okay. But you didn't do that here?

A No, sir.

Q And you have tape recorders at the FBI, right?

A Yes, sir.

Q You do investigations, undercover investigations, use tapes all the time to get accurate statements about what [36] people say, correct?

A Yes, sir.

Q And it's your policy not to record interrogations, correct?

A It's not my policy, it's not Dick Tomasso's policy, sir, it's the policy of the Federal Bureau of Investigation.

Q Okay. Can you identify why it wouldn't be good to have the best evidence of what was said for, say a suppression hearing?

A Well, sir, it depends. If I—I didn't have a tape recorder that day, but had I had a tape recorder and attempted to take it, I would need permission, actually, to do it. Secondly, this wasn't a very conducive situation. There were, maybe, eight or nine other people searching an apartment, there were loud voices talking, hollering going back and forth, so you get a lot of extra noises on the tape recorder. It's just not an ideal situation.

If I was going to tape record, I felt that something needed to be tape recorded, I would probably try to do it under more controlled circumstances, back in an office, maybe after a client talked to his attorney and decided, yes, that would be fine, gotten permission from the FBI. There are just a lot of circumstances to consider before you just whip out a tape recorder and start recording whatever he has to say, plus I didn't

know at the time if he was going to cooperate, wasn't [37] going to cooperate, was going to lie, not lie. There's just a quite bit, sir.

Q Well, it's your recollection, though, that—that he was there, he was in a towel, he was in the apartment while the search was going on. As you say, there's loud voices, people shouting out they found drugs?

A Yes, sir.

Q People shouting out they found guns?

A Yes, sir.

Q A lot of excitement going on there?

A Not excitement so much as the voices would be picked up on a recorder. That's the point I was making, not so much—

Q Well, okay, but is it safe to say that if you—

A There was other talking going on besides—

Q —wanted to , you could have him removed to some other quiet location for interrogation?

A Keep in mind, at this time it's still a state case, number one; I still don't have permission to take it through the federal system. We were following their rules and their regulations for taking him to a state detention center. And could we have removed him? Not necessarily during the search. We wanted him there to see what was taken.

Q Why did you want to see—have him see the—what was seized?

A Just so that he would see the receipt that we were going [38] to leave him for—and he couldn't say that wasn't taken from my apartment, for later on down the line.

Q So, was it ever explained to him that because a gun was found, he'd be facing mandatory time?

A No, I don't think I knew that to explain that. I was considering, basically, the drugs is what I was thinking about.

Q Well, do you believe that—do you understand there's sentencing guidelines—

A Yes, sir.

Q —and federal statutes regarding doing drug transactions with firearms?

A I know there are, sir, but I'm not so versed as to know if the guns are in the home, if it counts as being used in a transaction or on the person while he is making a sale. I think there's some—I think there may be some differences. So, I really wasn't aware enough of where we stood on it. I'm not an attorney.

Q But you would agree with me that the purpose, one of the purposes, at least, of having Mr. Banks present there during the search would be for him to see that the drugs were found, right?

A Actually, our main purpose was to solicit his cooperation. We wanted his supplier, basically.

Q Right. And if he saw that the hook was in the fish, so [39] to speak, that was your maximum moment of, perhaps, getting his tongue loosened.

A Yes, sir.

Q —correct?

A Yes, sir.

Q Now, you recall in your direct, you state that there was this interplay between yourself and Mr. Banks about whether he would cooperate, correct?

A Yes, sir.

Q In fact, at one point he said he would answer some questions and others he would not?

A Yes, sir.

Q And at one point he asked for a lawyer, right?

A No. I don't—he didn't—not while the interview —while we were interviewing him. If he had asked for a lawyer, we would have stopped interviewing him. He said before he would strike any deal to tell us who his supplier was, he would talk to—he would see if his—would talk to an attorney to see if it would be worth his while to give up his supplier. That's all he said.

Q Well, we're in the process of this interrogation and to determine whether he would cooperate, and he brings up what you say, well, I can't bind, you know, hey, I'm not the U.S. attorney, I'm not the judge—

A Yes, sir.

[40]

Q —but we can see what we can do, we'll let the court know about your cooperation. And then he says, well, maybe I need a lawyer?

A No, he didn't – it didn't come up like that. If he had said those words, maybe I need a lawyer, the interview would have terminated. It wasn't that context.

Q Well—

A I wrote down on my report how it came up.

Q Well, could you help me out here? At what point did it come up?

THE COURT: What come up?

MR. ROSKE: The lawyer.

THE COURT: I would—

THE COURT: Counsel, I thought he testified that a lawyer didn't come up. Did I misunderstand?

MR. ROSKE: It never came up during the—

THE WITNESS: No, sir. Your honor, he did say when asking me if—what kind of a deal could I make him if he cooperated—

THE COURT: Oh, okay.

THE WITNESS: —and gave us his—

THE COURT: I'm sorry.

THE WITNESS: —the information. At that point, he says, maybe I'll decide to cooperate and give you the identity of my suppliers, or something to that effect, after I talk to [41] an attorney to see what I can get out of it, or something like that.

And when did it come up in the conversation?

BY MR. ROSKE:

Q Yes.

A I mean, in the interrogation?

Q Right.

A Half to three quarters of the way through it, probably.

Q All right. But whatever he said didn't—didn't come into your mind that he was invoking his privilege to consult a lawyer?

A No, sir, that's right. I did not understand that.

Q He was speaking rhetorically, then, in your mind, well, maybe I should talk to a lawyer, is that right?

A No. It was, before I decide to cooperate and name my suppliers, I'll see what kind of a deal I could get through—once I consult an attorney. He needed an attorney to see what kind of a deal he could get him to give us his suppliers. He did not want to talk about his suppliers until he talked to an attorney about a deal; however, he did say he would talk to us about his own culpability.

Q So, in your mind, it was sort of a limited invocation of his—

A Well—

Q —right to consult with a lawyer about cutting a deal, [42] but not about incriminating himself?

A That's—yes, sir.

Q Okay. As I understand it, there was at least for about forty-five minutes, a lot of activity going on around what the officers were finding, like weapons, you recall there were weapons seized there, right?

A Yes, sir.

Q You recall that there was quantities of drugs located?

A Yes, sir.

Q. This was not just one of those deals where you go and you come back empty handed, this was a case that was going to be prosecuted, at least in the state system, correct?

A Yes, sir.

Q And you're saying that when this occurred Mr. Banks seemed cool as a cucumber, or calm, or what was the word you said?

A He was very calm. He was very, very—I don't know how to say it, very calm. Yes.

Q Here's this man, he's got armed police in his—in his apartment uncovering evidence that could put him

in the pokey for years, and in face of that he's showing no excitement to you?

A No, sir, he didn't. He was—in fact, he was very congenial about the whole thing. The whole—the interview was a very congenial interview. It was—I don't [43] know how else to explain it. I just can't think of the English word at the moment to better express it.

Q All right. Now, just so I'm clear on the policy not to record the interrogation, that's—that's agency policy or that was the North Las Vegas's policy?

A That's—that's agency policy.

Q Okay. Is that in the Manual of Investigative and Operational Guidelines?

A I'm going to guess that it is. I never read it, I was just—I know the policy just by attending, you know, classes and instructions.

Q Okay. You don't know where in that manual it is?

A Oh, no, sir.

Q But you're aware that it's there?

A I'm 99 percent sure that it's there.

Q All right. But if we had that manual produced, you could find it?

A Eventually.

Q All right. And you were not aware that Mr. Banks was given any field sobriety test at the scene?

A Was I aware that he was given one?

Q He wasn't given one, was he, that you saw?

A Oh, no. No.

Q He wasn't required to give a urine specimen about whether he had used drugs?

[44]

A No, sir. Not while I was present.

Q Okay. And you weren't the case agent, so, it wasn't your call, right?

A You know, as an FBI agent, I would have had some of the call on it along with Officer Crespo who was the case agent on the state case. I mean, he would have discussed it with me. But, basically, it was still the state—a state matter. Let me say this, if he says he [44] wanted to do it or thought he needed to, I wouldn't object—have objected, if that's what you mean.

Q All right. But I guess, I take it then, the decision later—what point, was it at the—after the interrogation that you decided to go federal with it?

A Oh, no sir. After I contacted the United States Attorney's office later that evening.

Q All right. And is it true that you had to use your—you had a statement, a 302, that you prepared in this matter?

A Yes, sir.

Q And I'm going to show you what's—and I don't have an extra copy of it, and I apologize, but—

THE DEFENDANT: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. ROSKE:

Q Show you what I would like to mark as Exhibit A, and ask [45] you if you can identify that?

A It appears to be a copy of my report.

Q And this is a report that you prepared after the interrogation process?

A Yes, sir.

Q This is, I guess, a report you dictated?

A Probably dictated it.

Q From your rough notes?

A Yes, sir.

Q And for the record, you made rough notes and you preserved them and you turned them over to the U.S. Attorney here prior to Court, right?

A Yes, sir.

Q And are these—and I can show you that they've been marked as B—okay, I'll give you A—and ask you if you can identify that?

A Appears to be my—oh, it is, here's my initials.

Q And those were the rough notes that you took of the interrogation?

A Yes, sir.

Q And you also took a log?

A Yes, sir.

Q Of what occurred?

A Yes, sir.

Q Which I'll propose as C, ask you if you can identify [46] that?

A Yes, sir. It's my log or a copy of it, it looks like.

Q All right. That's your handwriting, you recognize it?

A Right, Mm - hmm.

MR. ROSKE: Okay. This should be B, this should be C here.

Your Honor, I would move to admit the rough notes and long as part of this hearing.

MR. GREEN: No objection, sir.

THE COURT: They'll be admitted. You're not moving for Exhibit A?

MR. ROSKE: I'm—I'll also move to have that in, also, Your Honor.

MR. GREEN: No objection, sir.

THE COURT: All right. Exhibit A, B and C will be admitted.

(Defendant's Exhibits A, B, and C admitted)

MR. ROSKE: Pass the witness, Your Honor.

MR. GREEN: No further questions, sir.

THE COURT: You may step down, sir. Thank you.

THE WITNESS: Yes, sir, Thank you, Your Honor.

THE COURT: The witness is excused, I assume?

MR. GREEN: Yes, sir. The government would rest, sir.

THE COURT: Does the defendant wish to call any [47] witnesses?

MR. ROSKE: May I have the Court's indulgence?

THE COURT: Yes.

(Pause in the proceedings)

MR. ROSKE: Your Honor, after consulting with my client he indicates he would like to testify at this hearing.

THE COURT: All right. Come forward, Mr. Banks, and be sworn.

LASHAWN LOWELL BANKS,
DEFENDAN THEREIN, IS SWORN

THE CLERK: Thank you. You may be seated. Please state your name for the record.

THE WITNESS: Lashawn Banks. You want me to spell it?

THE CLERK: Your last name, please.

THE WITNESS: B-A-N-K-S.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. ROSKE:

Q Lashawn, I'm going to ask you some preliminary questions and, I guess, I'll use a leading format just to rush things along here. You understand that at this hearing, even though it is not your trial, you're not requires to offer testimony on your behalf?

A Yes.

Q You understand that I've consulted with you about your [48] taking the stand and offering testimony, and that decision to offer testimony is one that you understand can be made by you, but you alone. I can't make it for you, and Mr. Green can't make it for you, and not the Judge?

A Yes.

Q Do you understand that you have the right to remain silent, and that silence wouldn't be used

adversely by the Court for deciding the issues that we've presented to it on this pretrial motion?

A Yes.

Q You understand that you, in spite of the right to remain silent, et cetera, the admonitions that I've made on the record, that you need to indicate on the record whether it's your free and voluntary decision to offer testimony at this hearing?

[48]

A Yes.

Q Lashawn, I believe you're qualified to testify at this point with the canvass I've made.

MR. ROSKE: Your Honor, is that what you find?

THE COURT: The Court is satisfied. Yes.

MR. ROSKE: Okay.

BY MR. ROSKE:

Q Lashawn—

THE COURT: Do you have any objections?

MR. GREEN: No objection, sir.

[49]

THE COURT: All right.

MR. ROSKE: All right.

BY MR. ROSKE:

Q Lashawn, I'm going to ask if you can recall the 15th of July, 1998?

THE COURT: Excuse me, counsel, before you begin, let me make sure he understands one further thing with respect to his testimony.

Do you understand that if you elect to testify about any matter, that the government will have the opportunity to cross-examine you about that matter that you testify about?

THE WITNESS: Yeah, I understand.

THE COURT: Okay.

MR. ROSKE: All right.

THE COURT: You may proceed, counsel.

MR. ROSKE: Thank you, Your Honor.

BY MR. ROSKE:

Q I want you to call your memory back to a time in the 15th of July of 1998. That was sometime ago. Do you—could you tell me—well, let me ask you, sometime prior to that, do you recall on the 14th of July, 1998, do you recall what you were doing that night?

A Yes.

Q What were you doing?

A Basically, drinking and snorting cocaine and smoking weed [50] basically all night.

Q And do you recall when you retired that evening, when did you go to bed?

A I didn't.

Q You remained then awake throughout the entire night?

A Yes.

Q And did you try to go to sleep that night?

A No, not really. I was—I preferred to just do—get up.

Q Okay. And what did you do in the morning hours of the 15th of July, 1998, if anything?

A Nothing. Just sat up. Same thing, smoke weed, snort cocaine. I had this drink that I had just came across that I was drinking all night, maybe a shot in the morning, and—

Q What was that? Just—was it malt liquor? Was it—

A It's called Goldschlagers. Goldschlagers.

Q Okay.

A That's the name of it.

Q Was this something that you had in the apartment, or is this something that somebody brought over?

A Yes. It was—it was on the bar.

Q All right.

A Along with some other drinks that I had sitting up there.

Q All right. Did there—do you recall in the afternoon, maybe about 1:30, 1:45, what you were doing?

[51]

A Taking a shower.

Q Where in the apartment is this shower located? Is it at the back of the apartment? Is it the front of the apartment? The side of the apartment?

A In the middle on the side. Yes.

Q How many bedrooms is this apartment?

A Two.

Q And is there only one bathroom?

A Yes.

Q And that's off this hall?

A Yes.

Q Does the hall look down at the front door?

A No.

Q Okay. Now you're in the shower. You—do you have the water running?

A Mm-hmm.

Q What happens next?

A I heard a boom, I come out the bedroom, and that was it, mask, I lay on the floor, and knees in my back, and, you know, things like that, and they—they were searching the house.

Q Did you ever hear—you've heard earlier in the hearing this afternoon that there was a knock at the door and announce, " police, search warrant," or something to that effect. You ever hear—

A I did not hear—

[52]

Q —anything like that?

A I did not hear any of that. I heard a boom—

Q What did you believe—

A —like somebody shot the door open.

Q —the boom to be?

A I thought somebody shot the door open.

Q Okay. And when you came out, what was the first thing you saw?

A Guns and black masks and all black outfits, shirts, I guess, is what they had on, black pants, guns, black masks, and, you know, sweeping the house like this.

Q All right. You were on the floor then at the point after their entrance?

A Yeah, face down.

Q And were you ever moved from the floor?

A Yeah. The police pulled me up eventually.

Q And where were you taken, if anywhere?

A To the bath—I mean, no, to the kitchen table.

Q All right. Were you—did there come a time that you were provided something to wear?

A Yes, after I ask about it because I didn't want them to take me outside naked.

Q Okay. Do you recall whether that was early in—was there an interrogation process after that or not?

A After—after what?

[53]

Q After you being placed in the kitchen?

A Yes. After they placed me in the kitchen, yes, they started asking questions.

Q Okay. Was that before or after you got some clothing?

A It was—it was like in the middle. They asked questions, then they decided they wanted to give me the underwear. I thought—constantly was saying, you know, I don't want to go outside, ' cause that was my concern about them taking me outside in front of the people naked.

Q All right.

A There was no towel, like he stated, I wasn't on no towel. Never a towel.

Q All right. Did there—do you recall Officer Crespo testifying —

A Yes.

Q —as the first witness for the government?

A Yes.

Q Do you recall him as being present?

A I couldn't tell, they all had on masks. Officer Dick Tomasso, and there was another white gentleman sitting at the table with us the only ones that didn't have a mask on.

Q What were you feeling at that—at that time that—after the officers had smashed in the door?

A I was nervous, I was scared. I didn't—you know, I didn't know what was going on. I never been through anything [54] like that before, so, basically, I was just scared.

Q You—you've heard testimony that—by Agent Tomasso that you were calm?

A Yeah, I heard him.

Q Do you agree with that?

A No, I don't.

Q Were you concerned about what your fate would be as a result of these police officers and agents discovering drugs in your apartment?

A Yes, I was.

Q What was going through your mind?

A Basically, there was a lot of things going through my mind because I really couldn't even think clearly. It was, you know, I got one officer over here yelling, "this can get you life," got guns over here. You know, this is—it was a lot of commotion—

Q All right.

A —it was a lot of commotion.

Q Do you recall being presented with advice of rights form?

A Yes, I do.

Q Do you recall going over that form with Special Agent Tomas so?

A I don't believe we did. I signed it. Also I signed a consent to search my vehicle which I thought was all the same [55] thing, 'cause he said—he asked me, you know, can I search the vehicle, and he just leave me the paper. I signed it.

Q Do you believe that you were under the influence of the alcohol that you'd consumed, I guess, the morning prior, the night prior, sometime prior?

A Yes, I was. I never—I never went to sleep, and I was basically doing it all night long. And that's a real potent—that's a real potent drink.

Q What about the different drugs that you were taking? Would you think they still had an effect upon you at the time of the interrogation?

ASure, because I had freshly snorted a lot and smoked a joint right before I got in the shower.

Q How much time elapsed between your doing that prior to the shower and your being interrogated?

A I wasn't in the shower that long, so—

Q Fifteen minutes?

A About that. It's about that. I wasn't in the shower long, so—

Q Is it safe to say that you had concluded the shower at the time that you heard the boom, or not?

A No, I wasn't concluded yet.

Q Okay. Do you recall this business about—was there any time, do you recall. Mentioning consulting with a lawyer?

A Yes.

[56]

Q Could you tell the Court about that?

A Basically, it was basically like he said, that he was talking about giving up somebody. I was like, well, I think I need to talk to my attorney before we—

Q I'm sorry. I missed that. Basically—

A It was the way—

Q —the way he said it about giving up somebody?

A Giving up somebody, so I, you know, I said I—

Q What do you mean by that, giving up somebody?

A He wanted me to tell on somebody. So, I told him I wanted to talk to my attorney before we even continue the, you know, questioning.

Q All right. How far into the interrogation did you make this—or was this topic brought up?

A I'm not really sure.

Q Was it at the very end? Was it at the middle? Or was it near the beginning?

A Hmm, maybe—maybe in the middle sometime.

Q All right. Do you recall—were you—you were afforded at one point, then, the opportunity to make a call, correct?

A Yes.

Q We heard testimony about that earlier. Who did you call?

A I called my girlfriend.

Q Why did you call your girlfriend?

[57]

A To secure the house because they said they was taking me to jail, so I needed somebody to, you know, watch the house while I was gone.

Q Well, how long did this interrogation last from beginning to end?

A Since the time they came through the door since—since they left. I was at the table the whole time. Just—

Q Well, would you say a half hour?

A No, it'd have to be—

Q —More than a half hour?

A —more than that. Maybe—

Q Less than a half hour?

A I'd say at least a hour, at least a hour we was—we was talking, at least.

Q Do you recall anybody mentioning any time that you that you were facing?

A Yeah. It was a guy with a black mask, saying—in the kitchen, this will get you life; with the guns, you know, you're facing a lot of time. And they also had mentioned going through my mother's house, I wouldn't see my kids 'cause they knew I had two kids, stuff like that.

Q Did you feel at any time concerned about the weapons that you saw, the officer's—

A Yeah, because I didn't know who they were when they first came through the door. I didn't really [58] click into mind who they really were until they set me down at the table, and I saw Officer Tomasso's badge hanging from his—from his neck.

Q And you—you were under this state of excitement for what period of time during the interrogation?

A The whole time, you know, I couldn't really believe what was going on.

Q At any time were you handed a thing to write out anything on?

A No, I wasn't.

Q Did you see a tape recorder?

A No.

BANKS - CROSS

Q Do you think you were in a good frame of mind when you waived your rights on that Miranda warning form?

A If you—if you call getting high all night and drinking all night a good state of mid. I wouldn't

MR. ROSKE: Okay. I'm going to pass the witness.

THE COURT: You may cross-examine, Mr. Green.

MR. GREEN: Yes, sir, thank you.

CROSS - EXAMINATION

BY MR. GREEN:

Q Mr. Banks, you said you'd been up drinking that night previously, is that correct?

A Yes.

Q What time did you quit drinking?

[59]

A I don't really watch the clock, so, you know, I don't really know, but I don't—I didn't stop. I had another drink in the morning, I was snorting and smoking all night long.

Q Did you have friends over?

A A couple.

Q What time did they leave?

A Shit, I don't know.

Q Was it daylight or dark when they left?

A It was nighttime.

Q You think it was earl in the morning?

A Maybe.

Q But—

A I don't know. I don't know, we wasn't watching the clock. We—we getting high. The time doesn't really matter.

Q Before midnight of after?

A We don't have nowhere to go.

Q Can you tell me if it was before or after midnight?

A No, I really can't.

Q And you jumped in the shower that afternoon, is that correct?

A Yes.

Q And you had soap in your hair, would you agree with that as the officer testified?

[60]

A Not in my hair. No.

Q You had soap on your body?

A Yeah.

Q 'Cause you hadn't finished taking your shower?

A Exactly.

Q And the shower is not near the front door, is that correct?

A No, it isn't.

Q It's—it's on the far side of the apartment?

A It's not—the apartment isn't that big, so it's like—it's—the hallway is very small off to the right. It's not a very big apartment.

Q But it's not next door to the front door?

A No.

Q And then you were showering?

A Yes.

Q And then you heard the boom?

A Exactly.

Q And then you started walking out of the shower, is that correct?

A. Exactly.

Q But you—

A When I heard the boom, I came out to see what was going on.

Q And you turned off the water?

[61]

A Yeah.

Q And then you stepped out of the shower?

A Mm - hmm.

Q Then you started walking down the hall?

A The hall's not that big, so, stepping out the shower is the hall.

Q So, you stepped out—

A Put it like that.

Q —of the shower, and started walking down the hall, right?

A I stepped out of the shower, an that is the hall. It's one step—

Q And—

A —two steps from the shower is—you can look left, see the door.

Q And were you—were you able to walk over there? Walk out of the shower?

A Yeah. It's not—it not that far.

Q Were you able to—

A It's not even—it's not even from here to—here to right here.

Q Maybe I—

A You just step out the shower two steps—

Q Maybe I should rephrase it. Were you able to walk physically out of the shower?

[62]

A Yeah. I'm not handicapped.

Q Were you able to shower okay?

A Of course.

Q And you remember hearing this boom, right?

A Mm - hmm.

Q And then you remember seeing the cops?

A Yeah.

Q And you remember going to the ground as they instructed you, correct?

A Yes.

Q They told you to?

A Mm - hmm.

Q And you heard 'em, is that right?

A Yes, I heard 'em.

Q And you understood 'em?

A Yes.

Q And then they brought you to the table, right?

A Mm - hmm.

Q Then you remember they did give you some clothes, you say, once the questioning started, is that right?

A Mm - hmm.

Q But you remember distinctly that—

A They gave me a pair—

Q —they gave you clothes?

A —of underwear. Yeah.

[63]

Q Now, you're able to talk to the officers at this time, is that correct?

A Yes.

Q Did you understand what was going on at that time?

A Basically, they was looking for drugs. Yeah.

Q And you understood that at least Officer Tomas so was a police officer, is that right?

A Mm - hmm.

Q But you don't remember signing this form that he gave you?

A Yes. I signed two forms.

Q But you didn't know that you were waiving your rights?

A No, I—he told me that he wanted to search the vehicle, just leave me a—matter of fact, I don't even think it was him that's leaving me the paper, it was some other tall guy that's leaving me the paper, I believe, and asking me, can they search the vehicle.

Q So, it's your testimony that—

A So, I signed it.

Q —Mr. Tomasso didn't go over your rights with you at all?

A No, I believe he did say 'em verbally, though.

Q And that's when you were first brought to the table?

A I would guess so. I'm not sure about that, but I would guess so.

[64]

Q How was Mr. Tomas so acting toward you at that time?

A He—he was—he was calm. He was calm.

Q Did he threaten you in any way?

A No, it wasn't him, it was the other guys yelling about all the time I was looking at, and, you know, I'd never see my kids again, and all this other stuff. Good cop - bad cop type thing. He the good cop while the rest of 'em, you know, are yelling all across the apartment.

Q And you heard Mr. Tomasso talk about at the time when he said that you related to him that you didn't want to make a deal concerning his suppliers until you talked to the—your attorney to see if it would be worth it, is that correct?

A Mm - hmm.

Q Is that a fair statement from Mr. Tomasso?

A He talked about that and I said I wanted to talk to an attorney, you know, first before we go into that questioning.

Q And you were talking about your suppliers at that point?

A No, he was, I wasn't. I was telling him that I wanted to talk to my lawyer before we even go into that line of questioning.

Q And you said this was in the middle?

A It was—

Q What do you—and what in your mind do you mean—

A He was—

Q —when you mean in that line of questioning? What do [65] you mean?

A Come again?

Q What did—you said it was—you said you didn't want to talk about that line of questioning, go into that line of questioning. What line of questioning are you referring to in your mind?

A When he was talking about my suppliers. I told him I want to, you know, discuss anything with a lawyer before we even, you know, go into all that.

Q Discuss the suppliers?

A Yeah.

Q But not you?

A What about me?

Q Were you still willing to discuss you?

A Shit. The lawyer part came into this about the suppliers. When he said something about the supplier, I told him I want to discuss—you know, talk to a lawyer before we even go into all that.

Q And you say that was concerning your suppliers?

A Exactly.

Q And you say this may have happened in the middle, or it did happen in the middle?

A Yeah, it may have.

Q So, if we could just get to the point, are you saying you were trying to invoke your right to counsel at that point?

[66]

A Yes.

Q Did you continued answering his questions?

A Yeah, 'cause he was—he asked me, I remember one question he asked me, he asked me did I have drugs at my mother house, so I decided to answer that question, no, because I didn't want them going down there with their, you know, with their craziness.

Q Did you answer anything else after you say you tried to get a lawyer?

A I don't recall. I know that was one question that I know for sure I did answer.

Q Do you remember him talking to you any more after that?

A Basically, he—they gave me some clothes. They took me to get some clothes and they brought me to jail.

Q Oh, so after you said that, there really wasn't anymore questions other than your mother's house statement.

A That I can recall.

Q Well, you remember a lot of the details up to that point, though, right?

A What you mean?

Q You remember the officers questioning you, right?

A Yeah.

Q And you say you don't remember signing the form, though, right?

A I said I did remember signing the form, but he told me it [67] was a form search me vehicle. I didn't—I didn't read it, I just signed it.

Q And you were able to make a phone call, is that correct?

A Yes.

Q And you didn't call a lawyer, right?

A No. I figured I'd do that when I get to jail.

Q Did you ever tell Special Agent Tomasso, "I want to speak to an attorney, I don't want to answer any more of your questions"?

A No, I did not.

Q Did you happen to notice these officers when they came through that they were wearing uniforms that said, or they were wearing jackets or vest that said, "Police" on it?

A I don't believe their uniform said, "Police" on the front. I don't—I don't—I don't think so. I'm not—I don't think they said "Police" on the front. I believe it said something on the back. I don't think it said, "Police" on the front, though.

Q Did you have any reason to believe that once these people identified themselves that they were not police officers?

A Did I have reason to believe it? Basically, I didn't know what to believe. I done heard of cases when people get their door kicked in, people acting like they're police officers, and just there to do robberies. Like I said, I've never been through that before, so I don't know if they were [68] the police, if they were robbers. I've never known the police to come through with hoods on their face. See what I'm saying?

MR. GREEN: No further questions, sir. Thank you.

THE COURT: Any redirect, Mr. Roske?

MR. ROSKE: No, Your Honor.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

THE COURT: Does the defendant have any other witness, Mr. Roske?

MR. ROSKE: No, we have no other witnesses to call, and we would then submit the matter, if the Court wants to hear some argument.

THE COURT: I'll leave that to counsel. If you want to make some short comments, I would be happy to hear 'em.

MR. ROSKE: I guess a couple of things that, you know, I'm just going to try to address some things that aren't clear in what we've raised in the pleadings. One thing that's kind of reared its head in the course of the hearing wasn't fully briefed, of course, is the issue of the invocation, whether there was an invocation for the right of counsel or not, that's something you're going to have to decide.

If there was an invocation to the right of counsel, then I think the law is clear that the interrogation should [69] have entirely ceased at that point, and you know, they didn't have to get him counsel at that point, but they certainly shouldn't have continued the interrogation.

The Court is going to have to have to determine the issues of intoxication. Clearly there is a discrepancy in the testimony, I see, between the officers and the defendant in terms of mental state. I think that voluntary intoxication does, of course, affect ability to make an intelligent and knowing waiver of one's Miranda rights. It may also impact upon the ability to see the need to have counsel or to request counsel.

I think also, probably the Court is faced with the knock and announce issue. I think it's—under the circumstances, the officers said they knocked, announced and waited, but we have the testimony of the defendant in contrast that the only thing he heard was the boom. Apparently, I guess the only middle ground for the Court is that perhaps because of the shower running and the circumstances of the knock and announce not being loud or sufficiently loud enough to have him hear and respond to the door, the time frame between the knock and announce and the forcible entry is fifteen or twenty seconds, depending upon which of the two officers involved are.

I'd submit that that weight is also a factor the Court has to weigh in the balance. The officers seemed to [70] think that waiting fifteen seconds is an inordinate amount of time. What if someone is in bed asleep? They're expected, under this scenario, to instantly be at the door. I think that that doesn't—isn't the policy behind the knock and announce. I think there has to be some effort to wait longer or to repeat the process, and that that apparently wasn't done, at least according to what I heard here today.

And, Your Honor, if the Court would like additional points and authorities on any of these matters, I'd be happy to do that. I would point out to the Court that I'm starting a jury trial in front of Judge Rawlinson tomorrow, and so it might take me a couple of days to be free of that matter to respond to the Court.

THE COURT: I don't know that I—before you leave, Mr. Roske, I don't know that I need additional briefing, but what do you understand the law to be as to

what constitutes a reasonable amount of time after knocking and announcing?

MR.ROSKE: Well, Your Honor, I think that fifteen seconds isn't realistic enough to—if the purpose behind that rule—

THE COURT: I understand that you're arguing that you don't think fifteen seconds is long enough, but—

MR. ROSKE: Well, I think that—I think something around thirty seconds or forty-five seconds would be a threshold amount of time to allow somebody to meaningfully go [71] from one end of an apartment to another. You don't really give a person any opportunity to respond if you've only waited fifteen seconds, and that would assume that—I understand the officers are thinking of their safety first, and I understand that's their concern, but we also have a statute that we're also trying to comply with that intends that there be a voluntary entry permitted, and if that's not a realistic amount of time to wait fifteen seconds and, in fact, in this case, he's in the shower. How could he respond in that fashion meaning fully?

THE COURT: Thank you.

MR. GREEN?

MR. GREEN: Yes, sir. I think the Ninth Circuit, and I may be wrong about this, I think they looked at around eight to ten seconds for the knock and announce period for the grace period before they go in. I think thirty seconds, is way too long for a crack dealer with guns in his apartment when you have officers trying to make entry. I think that's ridiculous.

He was in the shower. If they would have waited, you know, another thiry seconds or maybe another ninety seconds or a hundred and twenty seconds, he would have never heard it 'cause he was in the shower. The only thing he hears is the battering ram through the door. So, that point is moot.

[72]

The defendant brings up in the motion that he was to incapacitated by all the excitement. Well, excitement is not a matter of coercion which you must find for the governments not to be able to use his confession. If you'd look, sir, he even admits he's able to talk, he's able to walk, he's able to read, he's able to follow instructions, he's able to carry on conversations, he's able to walk out of the apartment, he's able to request clothes, he's able to call his girlfriend, he's able to be worried about that, he's able to be worried about things about such as well, maybe I shouldn't tell you 'til I talk to my attorney type things. This person is engaged in conversation, he's able to think and read and write.

Now, even though he may not remember it now, The FBI agent certainly remembers him being able to execute his rights at the time he saw was witnessed by two individuals.

Further, sir, the defense brings up its—mention that it reared its ugly head concerning the request for attorney. I'd ask that Special Agent Tomasso's statement be looked at as Exhibit C, which I've provided to you. On page 27, the paragraph—last full paragraph explains that part, just as Special Agent Dick Tomasso said. It's corroborated by him. We could

certainly recall the—Police Officer Crespo to—if you need any more things on that.

As far as being able to brief more matters, sir, I [73] don't think anything is necessary at this point. I think we've covered everything. Of course, if you would, we would be able to clarify any such issues that you need to be addressed. Thank you.

THE COURT: Thank you.

The Court will take the matter under submission.

PROCEEDING CONCLUDED AT 4:00 P.M.

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